80-1420

Office-Supreme Court, U.S.
FILED
FEB 23 1981
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

UNCLE BEN'S, INC.,
Petitioner,

v.

THOMAS JOHNSON, Individually and on Behalf of All Others Similarly Situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court below erred in holding that the District Court adopted and applied an erroneous notion of controlling legal principles regarding the use and role of statistics in an employment discrimination case?

2. Whether the Court below erred in approving the unqualified use of static workforce data to establish a *prima facie* case of promotion discrimination?

3. Whether the Court below erred in holding that comparisons of a defendant's workforce to the external labor market are irrelevant in determining whether the defendant discriminates against blacks with respect to promotions?

4. If a *prima facie* case of discrimination in promotions is established, does *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) require a defendant to prove the existence of legitimate, nondiscriminatory reasons by a preponderance of the evidence?

5. Whether the disparate impact theory is applicable to claims of classwide discrimination which merely claim defendant bases promotions on race and do not identify any objective, facially neutral employment practice alleged to disproportionately affect blacks?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Uncle Ben's, Inc. respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Johnson* v. *Uncle Ben's, Inc.*, 628 F.2d 419, entered on October 17, 1980.

OPINIONS BELOW

The opinion of the District Court is reported at 71 F.R.D. 19 (S.D. Tex. 1978), and is reprinted in the separate Appendix hereto as App. C. The first opinion of the Court of Appeals is reported at 615 F.2d 915 (5th Cir. 1980), and is reprinted as App. B. The opinion of the Court of Appeals on rehearing — the

decision from which certiorari is sought — is reported at 628 F.2d 419 (5th Cir. 1980), and is reprinted as App. A.

JURISDICTION

The judgment sought to be reviewed was dated and entered on October 17, 1980. Uncle Ben's Petition for Rehearing and Suggestion of Rehearing En Banc (App. D) was denied by Order dated November 24, 1980 (App. E). The jurisdiction of this Court is invoked under 28 USC §1254(1) (1976).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"), 42 U.S.C. §2000e, *et seq.*, page 277, and 42 U.S.C. §1981, page 210. Relevant portions of these Statutes are reprinted in App. F.

STATEMENT OF THE CASE

A. PROCEDURAL OVERVIEW

Thomas Johnson (hereinafter "Plaintiff") brought this class action on March 28, 1974, alleging Uncle Ben's, Inc. (hereinafter "Uncle Ben's" or "Defendant") discriminated against him and similarly situated blacks and Mexican-Americans in violation of 42 U.S.C. §1981. The complaint was amended September 12, 1975 to add Title VII of the Civil Rights Act of 1964. Plaintiff's allegations were limited to the period commencing March 28, 1972 and charged discrimination "with respect to compensation, hiring, promotion, transfer, seniority and other terms and conditions of employment."[1]

[1] The Pretrial Order stated the issue in terms of determining discrimination from and after March 28, 1972. This time frame limitation under §1981 is consistent with *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1378 (5th Cir. 1974). Under Title VII, a violation could only be based on discriminatory acts occurring within 180 days of the filing of Plaintiff's EEOC charge on February 19, 1974, i.e., August 19, 1973. *United Airlines* v. *Evans*, 431 U.S. 553 (1977).

The case was tried October 3-21, 1977, with Plaintiff representing a class of blacks and Mexican-Americans.

At the end of Plaintiff's direct case, Defendant's motion for dismissal was granted as to all issues except discrimination in promotions of blacks.[2] In rebuttal of Plaintiff's *prima facie* case, Defendant called its personnel manager and three experts. At the conclusion of Plaintiff's direct examination of his expert rebuttal witness, the District Court ruled for the Defendant from the bench. The District Court entered detailed Findings of Fact and Conclusions of Law on January 11, 1978. Plaintiff filed his Notice of Appeal on February 9, 1978.

The Fifth Circuit affirmed *per curiam* on April 11, 1980. On April 24, 1980, Plaintiff filed a Petition for Rehearing, contending the panel erred in affirming the District Court's Findings under the clearly erroneous standard. Plaintiff argued that the District Court's statement regarding statistics (App. C-2) was erroneous as a matter of law because it reflected the District Court's belief that statistics are irrelevant in judging claims of employment discrimination. The Fifth Circuit did not request a response from Defendant. On October 17, 1980, the panel granted the petition for rehearing, ruling that the District Court adopted and applied an erroneous notion of controlling legal principles on the role of statistics. The panel modified and affirmed in part, reversed in part, and remanded.

B. THE PROCEEDINGS BEFORE THE DISTRICT COURT

Plaintiff's statistical proof in his direct case was limited to testimony adduced from Dr. Richard Tapia, a statistician. Dr. Tapia's sole concern and his subsequent analyses concentrated on the existence of a pattern of disparity with respect to what he perceived as the "upward mobility," i.e., monetary advances

[2] As phrased by Plaintiff's expert, the issue was actually one of "upward mobility," which was defined by Plaintiff's expert as the monetary advancement of incumbent employees over time.

over time, of black employees.[3] Tapia based his conclusions on Table III of Plaintiff's Exhibit 8, primarily Table III.3, his only analysis restricted to the relevant time frame as defined in the pre-trial order. Table III.3 purported to assess the 1971-1974 "upward mobility" of blacks and whites *employed both dates* and encompassed only comparisons of *average wage increases*. Dr. Tapia relied on Table III.3 to conclude that blacks in lower income groups had not progressed forward as rapidly as whites.

Cross-examination of Dr. Tapia and the testimony of Defendant's witness, Dr. Roy Gilbert, an expert in econometrics and computer systems, disclosed that Table III.3 was inaccurate in virtually every respect. When Dr. Tapia's statistics were corrected by Dr. Gilbert, they failed to establish a discriminatory pattern favoring whites. Rather, the statistics established a pattern of upward mobility which did not favor whites, and, overall, *did favor blacks* with significantly greater wage increases.[4]

Defendant's expert proof was introduced through Dr. Richard Jeanneret, an industrial psychologist and management consultant, Dr. Gilbert, and Dr. Gordon Otto, an expert in econometrics.

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[3] Although Plaintiff's allegations included the entire spectrum of Defendant's employment practices and policies, Plaintiff's expert testimony and statistical analyses were limited to upward mobility as a function of salary increases. The only reference made by Dr. Tapia to any other employment policy/practice was to hiring, as to which he commented favorably. Specifically, in his effort to explain how the fact that from 1971 to 1974 the wages of black employees advanced more rapidly than the wages of whites, he cited the increased hiring of blacks into higher paying positions.

[4] Whereas Dr. Tapia claimed that the "all" employee category included 174 white and 102 black employees (P., Ex. 8, Table III.3), there were actually 191 white and 127 black employees (D. Ex. 31). Instead of the 20% white and 22% black average employee wage increases shown on Table III.3, white employees actually received only 17.97% on the average while blacks received 23.01% (D. Ex. 31). Contrary to Dr. Tapia's testimony, the percentage difference *favoring blacks* was statistically significant at the 5% level. In fact,

Dr. Otto examined all promotions that occurred at Uncle Ben's from 1970-1974. Based on this examination, Dr. Otto concluded that no statistically significant differences existed in the advancement of blacks and whites (a) in the number of promotions, (b) time in grade prior to promotion, and (c) wage increases received upon promotion.

Dr. Jeanneret analyzed Defendant's job descriptions in accordance with EEOC and professional guidelines and accurately placed Uncle Ben's jobs in 1970 census occupational categories. He established that a great many jobs at Uncle Ben's

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the difference was highly significant, amounting to 5 standard deviations. Comparable errors in Dr. Tapia's analyses exist with respect to the employee group of "all except managers and officials" (D. Ex. 31); although the difference is no longer statistically significant, the average wage increase received by black employees during the subject time period exceeded by 1.26% that received by whites (D. Ex. 31). These analyses were limited to employees employed throughout the relevant time frame.

In terms of the wage level groupings utilized by Dr. Tapia, e.g., "at or below a given wage rate," Defendant's evidence established that the conclusion reached by Dr. Tapia in each instance was erroneous (D. Ex. 51, 60). In the lowest wage level, less than or equal to $8,500, Dr. Tapia found that whites received an average 53% wage increase while blacks received only 30% (P. Ex. 8, Table III.3). Identifying the subject employees by name and listing their wage rates as of 8-8-71 and 5-10-74, Dr. Gilbert established (1) that the average percentage increase for whites was 35.9% and for blacks was 30.5%, and (2) that this difference was not statistically significant at the 5% level (D. Ex. 57). With respect to the group of employees earning less than or equal to $9,000 (P. Ex. 8, Table III.3), Dr. Tapia claimed that the white (43%) vs. black (29%) wage differential was statistically significant at the 1% level. Again identifying the subject employees by name and giving their wage rates as of 8-8-71 and 5-10-74, Dr. Gilbert established that the actual difference was 3.3% (32.5% for whites and 29.2% for blacks) and that this difference also was not statistically significant (D. Ex. 57). In addition, Dr. Gilbert demonstrated the bias resulting from Dr. Tapia's use of dependent groupings. If rather than focusing on *all* employees earning less than or equal to $10,000, the analysis was limited to those earning less than or equal to $10,000 *and* more than or equal to $9,000, black wage increases actually exceeded those received by white employees (D. Ex. 60).

require knowledge or skills not obtainable through on-the-job or internal training or experience.[5]

Because many jobs require knowledge or skills not obtainable at Uncle Ben's, Gilbert, using the job to census category correlations and the 1970 census, computed the proportionate availability of whites and blacks for the jobs at Uncle Ben's. He then compared the actual number of employees in Uncle Ben's job zones with this expected number and concluded that the employment pattern at Uncle Ben's was consistent with external availability.

Defendant's Personnel Director, Herman Koehn, presented evidence of the upward mobility of individual black employees whom Plaintiff claimed had been relegated to lower level jobs.[6] He testified that any differences in black-white upward mobility

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[5] Dr. Jeanneret listed numerous positions both in the plant and office that require certain knowledge, ability and/or skills that cannot be obtained merely by working at Uncle Ben's. For example, he observed that welders need welding experience; sheetmetal workers need sheetmetal skills; food technologists need knowledge of chemistry and biology plus an understanding of research principles; typists must be able to type; maintenance first class employees need electrical and mechanical skills; cost, control, budget, and financial analysts need accounting skills; microbiology analysts need training in microbiology or a related specialty; keypunch operators need keypunch training; computer operators need training in operating computers; production schedulers need mathematical skills and ability to forecast production schedules.

[6] The black employees identified by Defendant were in response to Plaintiff's statistical analyses, which focused on blacks on the payroll as of May 1974 who were hired prior to 1965 or 1960. Also, Table V of Plaintiff's Exhibit 8 identified specific employees whom Dr. Tapia claimed were illustrative of Plaintiff's theory that blacks in lower job zones did not advance, in terms of wage increases, as fast as whites. In light of Plaintiff's assertions, the importance of evidence demonstrating why certain identified individuals within lower level jobs did not advance to upper-level positions cannot be gainsaid. Accordingly, Defendant presented, through its Director of Personnel, evidence regarding the upward mobility of blacks identified or referenced through Plaintiff's analyses.

were due not to race, but to specified individual attributes of the employees in question, e.g., lack of interest in changing jobs; failure to obtain outside training and requisite skills; limited ability to read, write and make numerical calculations; promotion refusals; non-shift work requests; and performance shortcomings. Plaintiff offered no evidence that the explanations given by Mr. Koehn were pretextual.

C. THE DISTRICT COURT'S OPINION

The District Court, having heard approximately three weeks of testimony and having reviewed a multitude of documentary evidence, entered detailed Findings of Fact examining the extensive statistical analyses conducted by both Plaintiff's and Defendant's expert witnesses (App. C).

The Court rejected the conclusion drawn by Plaintiff's expert from his "upward mobility" analysis of average wage increases that blacks in lower income groups had not progressed forward as rapidly as whites. Specifically, the Court found:

> 12. During the period from August 8, 1971 through May 10, 1974, limiting the analysis to employees who were employed on both dates, Defendant's black employees received a statistically significant greater wage increase than did Defendant's white employees. See Defendant's Exhibit No. 31. Further, contrary to Table III.3 of Plaintiff's Exhibit No. 8, the Court finds that the percentage increase in black wages exceeded the percentage increase in white wages regardless of whether or not individuals in job classifications falling within EEOC category "Officials & Managers" are included. See Defendant's Exhibit No. 31. Utilizing salary level grouping suggested by Plaintiff's Exhibit No. 8, e.g., employees earning less than a given amount, any differences in black-white wage increases during the 1971-74 period were not statistically significant. See Defendant's Exhibit No. 57 (App. C-4, C-5).

With respect to Dr. Otto's analysis of all promotions which occurred at Uncle Ben's during 1970-1974, the District Court found that in terms of (a) the number of employees promoted,

(b) their time in grade prior to promotion, and (c) the wage increases received upon being promoted, "there has been no statistically significant difference in the treatment of Defendant's black and white employees." Findings of Fact No. 19 (App. C-6).

The District Court additionally found that any claimed differences in upward mobility as between black and white employees were due to specific, individual attributes of Defendant's employees, not to the race of the employee concerned. According to the court, these attributes included, "for example, limited ability to read, write and make numerical calculations; promotion refusals; demotion requests; non-shift work requests; lack of interest in changing jobs; and performance shortcomings." Findings of Fact No. 13 (App. C-5).

On the basis of these factual findings, the Court concluded that Uncle Ben's did not discriminate against Plaintiff and the class he represented on the basis of race with regard to promotions. Conclusions of Law No. 4 (App. C-6, C-7).

The District Court incorporated into his detailed findings the following remarks made from the bench at the conclusion of Plaintiff's direct examination of his expert rebuttal witness:

> *First*, on statistics. *If* we accept the Plaintiff's side of the case, all that the experts say, the way I see it, is that what has transpired in the real world at Uncle Ben's could not have statistically happened by chance.[7] We are not here to enforce a law which says that things must occur within the limits of mathematical probability. The law says the defendant may not discriminate on the basis of race. The

[7] Significantly, the District Court's statement speaks in terms of "*if* we accept the Plaintiff's side of the case all the experts say, . . . is that what has transpired in the real world at Uncle Ben's could not have statistically happened by chance," not that the District Court *did* accept Plaintiff's side. Obviously, the District Court did not. *See, generally* Findings of Fact Nos. 10-19 (App. C-4, C-5, C-6).

law does not say that the defendant shall not violate the rules of mathematical probability.

A business such as the Defendant's cannot be run successfully by chance. Decisions as to who may best serve in any given job must be made rationally by persons with sufficient knowledge of the individuals and the jobs involved to make such decisions.

Second, having had the opportunity both to see and hear all of the witnesses in this case, I have concluded that any discrimination at Uncle Ben's has been color blind. In this case it has been between individuals without reference to race or other impermissible criterion. (App.C-2). (Emphasis supplied).

D. THE COURT OF APPEALS' DECISION

Initially, the Fifth Circuit affirmed *per curiam*, stating:

> In the course of rendering its decision, the district court stated "that what has transpired . . . at Uncle Ben's could not have statistically have [sic] happened by chance," yet "[t]he law does not say that defendant shall not violate the rules of mathematical probability." Although this and similar statements indicate the court's confusion as to the role of statistics in cases of this sort, e.g., *Fisher* v. *Proctor & Gamble Mfg. Co.*, . . . F.2d . . . (5th Cir. 1980) [slip op. 3737, 3757], we affirm because, when evaluated on legally sufficient grounds, the district court's findings regarding the lack of discrimination in the promotion of blacks at Uncle Ben's are not clearly erroneous.

On rehearing, the Fifth Circuit reversed the District Court's decision in part and remanded the case to the District Court. The Court of Appeals premised that reversal on its conclusion that the District Court's statement "the law does not say that the defendant shall not violate the rules of mathematical probability"[8] is an incorrect assessment of the role of statistics in a Title VII case. Noting that the "clearly erroneous" standard of

[8] Through the use of italics, it is clear that this statement was specifically viewed by the Fifth Circuit as the basis for concluding the

Rule 52(a) does not apply to findings of fact made under an erroneous notion of controlling legal principles, the Court purportedly undertook an independent analysis of the record.

The Fifth Circuit did not set aside any of the detailed Findings of Fact of the District Court. Instead, the panel focused on what it perceived as omissions from those findings, observing that the District Judge "frankly ignored deciding the questions of whether any promotion or upward mobility occurs at Uncle Ben's, and, if so, whether blacks suffer a disparate impact in seeking promotions" (App. A-14). In the Fifth Circuit's view, the District Court based its conclusion that Uncle Ben's had not violated Title VII on favorable statistics comparing Uncle Ben's work force at various levels and similar Houston SMSA job levels (App. A-18). Accordingly, the Court remanded the case to the District Court to enter new findings.

> First, the new findings must determine the number of Uncle Ben's jobs that were filled by promotion ..... Second, the District Court must decide whether Uncle Ben's has rebutted or discredited plaintiffs' prima facie showing that in promotions blacks are relegated to lower level jobs and are promoted at a significantly slower rate than whites. On this question, statistics comparing Uncle Ben's work force to the external labor market are irrelevant. Third, the district court also must find whether the legitimate nondiscriminatory reasons that it credited, based on a correct view of the controlling legal principles on that point, apply to any of the promotion positions and not just to the lateral hire positions (App. A-14, A-15).

On the latter point, the Court held that Uncle Ben's was required to prove the existence of legitimate, nondiscriminatory reasons by a preponderance of the evidence (App. A-10).

District Court applied an erroneous notion of controlling legal principles regarding the use of statistics (App. A-5).

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S HOLDING THAT THE DISTRICT COURT EMPLOYED AN ERRONEOUS STANDARD TO ASSESS STATISTICAL EVIDENCE ITSELF MISCONCEIVES THE PROPER ROLE OF STATISTICAL EVIDENCE IN JUDGING DISCRIMINATION.

> We are not here to enforce a law which says that things must occur within the limits of mathematical probability. The law says the defendant may not discriminate on the basis of race. The law does not say that the defendant shall not violate the rules of mathematical probability (App. C-2).

This statement was made by the District Court from the bench after the presentation of Plaintiff's case in chief, the introduction of Uncle Ben's rebuttal evidence, and the testimony of Plaintiff's rebuttal witnesses. The Fifth Circuit held the statement "the law does not say that the Defendant shall not violate the rules of mathematical probability" to be an incorrect legal standard[9] and determined that in light of the District Court's "misunderstanding" of the role of statistics in Title VII cases, the reviewing Court was not bound by Rule 52(a)'s "clearly erroneous" standard (App. A-5, A-6).

The Fifth Circuit did not explain why it judged the District Court's statement to be incorrect. Although the Court cited such oft-quoted principles as "statistics play an important role in judging discrimination" and "gross statistical disparities may establish a prima facie case," (App. A-6), the Court nevertheless recognized that "[t]he district court correctly determined that plaintiff's *statistical evidence* and testimonial evidence made out a *prima facie* showing of discrimination against blacks on the promotion issue" (App. A-10) (emphasis supplied). Moreover,

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[9] *See* Note 8, *supra*.

with the numerous findings by the District Court regarding statistical analyses, *see e.g.*, Findings of Fact Nos. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 (App. C-4, C-5, C-6), it cannot be said that the District Court ignored or considered irrelevant statistical evidence or failed to recognize the "important role" of statistics in judging discrimination.[10]

The District Court's remarks at the conclusion of Plaintiff's examination of his rebuttal witnesses, later incorporated into his detailed Findings of Fact, stated that even *if* Plaintiff's statistical analysis were credited, all it showed was that what transpired at Uncle Ben's could not have statistically happened by chance.[11] Significantly, however, noting that the law prohibits racial discrimination and not the mere violation of the rules of mathematically probability, the District Court added that having seen and heard all of the witnesses, in the Court's judgment, any discrimination "has been color blind . . . between individuals without reference to race" (App. C-2).

When read in context, it is clear that *all* the District Court said was that evidence of statistical disparities standing alone does not *prove* discrimination. While statistical disparities may establish a *prima facie* case, the inquiry is not ended. The burden merely shifts and the Defendant is given an opportunity to rebut Plaintiff's statistics or justify any disparities by articulating legitimate, nondiscriminatory reasons for its actions.

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[10] The careful attention paid by the District Court to Plaintiff's and Defendant's statistical testimony and the Court's thorough evaluation of statistical analyses in assessing Plaintiff's claims, as evidenced by Findings of Fact Nos. 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19, is addressed at pages 14 through 17, *infra*.

[11] As observed in note 7, *supra*, the District Court did not credit Plaintiff's analysis. On the contrary, Findings of Fact Nos. 11 and 12 make clear that the District Court *discredited* the conclusion drawn by Plaintiff from his statistical analysis that blacks suffered limited "upward mobility" in terms of wage increases.

Where such reasons exist, statistical imbalances, even if present, prove nothing.

If the foregoing statement represents an incorrect understanding of the role of statistics in a Title VII case, then, according to the Fifth Circuit, the converse must be true. That is, "the law says the defendant shall not violate the rules of mathematical probability." This statement is obviously inaccurate. If the mere violation of the rules of mathematical probability contravenes federal civil rights standards, then the entire body of case law developed by this Court has been grossly altered. *International Brotherhood of Teamsters* v. *United States,* 421 U.S. 324, 339-40 (1977) and *Hazelwood School District* v. *United States,* 433 U.S. 229, 307-08, 312-13 (1977), admonish that while gross statistical disparities alone may in a proper case constitute *prima facie* proof of discrimination, "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." While statistics may be "helpful" in proving discrimination, they are not controlling as to individualized employment decisions. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 805 n.19 (1973). "The use of statistics is conditioned by the existence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn." *White* v. *City of San Diego,* 605 F.2d 455 (9th Cir. 1979). "In addition to statistics, a court must also examine patterns, practices and general policies to ascertain whether racial discrimination exists." *Barnett* v. *W. T. Grant Co.,* 518 F.2d 543 (4th Cir. 1975).

The statement of the District Court, while rejected in this instance by the Fifth Circuit, is remarkably similar to statements made by that Court in other cases. *See, e.g., U.S.* v. *City of Miami,* 614 F.2d 322 (5th Cir. 1980) ("Of course, statistics do not tell the whole story. There may well be an explanation

other than intentional racial or sexual discrimination for some or all of these statistical disparities."); *Hereford* v. *Huntsville Board of Education,* 574 F.2d 268, 273 (5th Cir. 1978) ("Discrimination in promotions is not proved merely by the absence of blacks in particular positions . . . . For a cause of action to exist, the defendant must actually have discriminated on the basis of race.") The Fifth Circuit has cautioned that statistics must be kept in perspective:

> We recognize that statistics are a powerful tool in the hands of the Title VII plaintiff, but we are also aware that undue emphasis upon their use may obscure rather than advance the judicial process.

Hester v. *Southern Railway Co.,* 497 F.2d 1374, 1381 (5th Cir. 1974). Obviously, that perspective has not been maintained in the instant case.

The Fifth Circuit took a statement which, on its face, is nothing more than a simple, yet accurate summarization of the shifting burdens and degrees of proof in a Title VII case, lifted one sentence out of context (which nevertheless was absolutely accurate), and without explanation, declared "this standard is incorrect" (App. A-6). In response to this assessment of the District Court's statement, the admonition of Justice Rehnquist in his dissent from the denial of certiorari in *Procter & Gamble Manufacturing Co.* v. *Fisher,* (No. 80-474, January 19, 1981), is well taken.

> This Court has recognized that "[s]tatistical analysis has served and will continue to serve an important role as one indicator of racial discrimination . . . ." *Mayor of Philadelphia* v. *Educational Equality League,* 415 U.S. 605, 620 (1974). The blind use of statistics, however, cannot be permitted to undermine the policies of Congress or erode our decisions on substantive law. Disraeli's familiar statement that "there are three kinds of lies: lies, damn lies and statistics," rings true in this case.

In the instant case, the District Judge, who heard weeks of statistical and testimonial evidence and reviewed a multitude of exhibits, carefully evaluated whether Uncle Ben's promotion practices were discriminatory and entered detailed Findings of Fact. In its initial, *per curiam* opinion, the Fifth Circuit held these findings not clearly erroneous when evaluated on legally sufficient grounds (App. B-2). Thereafter, without explanation or meaningful analysis and based on its own misconceived approach to statistics, the Fifth Circuit undertook an independent review of the record and concluded that certain findings, although not necessarily erroneous, were lacking (App. A-14, A-15, A-16). Claiming that the District Court "frankly ignored deciding the question of whether any promotion or upward mobility occurred at Uncle Ben's, and if so, whether blacks suffer disparate impact in seeking promotions," the Fifth Circuit remanded the case to the District Court to enter new findings on the promotion issue.

The claim by the Fifth Circuit that the District Court failed to address whether any promotions occurred at Uncle Ben's is patently erroneous. Finding No. 19 makes clear that the District Court did indeed evaluate actual promotions that occurred at Uncle Ben's during the relevant time frame and concluded:

> 19. In terms of the number of employees promoted, their time in grade prior to promotion, and wage increases received upon being promoted, the Court finds that there has been no statistically significant difference in the treatment of Defendant's black and white employees. See Defendant's Exhibit Nos. 36, 37, 38, 39, 40, 41, 42 (App. A-C).

This Finding is, as it so states, predicated upon Defendant's Exhibit Nos. 36-41 and 42 (A-C), *wherein all promotions at*

Uncle Ben's for 1970-1974 were analyzed in terms of the three factors enumerated in Finding No. 19.[12]

Finding No. 12 addresses Plaintiff's analysis of "upward mobility," i.e., monetary advances over time, of blacks and whites employed by Uncle Ben's throughout the relevant time frame. It specifically discredits Plaintiff's assertion based on Exhibit No. 8, Table III.3 that blacks suffered limited upward mobility in terms of wage increases.

> . . . Further, contrary to Table III.3 of Plaintiff's Exhibit No. 8, the Court finds that the percentage increase in black wages exceeded the percentage increase in white wages regardless of whether or not individuals in job classifications falling within the EEOC category "Officials & Managers" are included. See Defendant's Exhibit No. 31. Utilizing salary level groupings suggested by Plaintiff's Exhibit No. 8, *e.g.*, employees earning less than a given amount, any differences in black-white wage increases during the 1971-1974 period were not statistically significant. See Defendant's Exhibit No. 57 (App. C-4, C-5).

It further finds:

> During the period from August 8, 1971 through May 10, 1974, limiting the analysis to employees who were employed on both dates, Defendant's black employees received a

[12] Defendant showed that employee advancement in each of its three major job groupings — plant-hourly, office-hourly, and salaried — is normally within that group and rarely involves moving up more than one or two job zones (Exhibit No. 42(A-C)). Defendant further established that the time spent in a particular job zone varied among the three classifications (Exhibit Nos. 36, 37, 38). Accordingly, Defendant presented an analysis comparing the movement of black and white employees within each classification from one job zone to another during the period July 1970 to June 1974. The District Court determined that because of these office-plant differences, statistical analyses which separate office and plant employees were proper, allowing meaningful comparisons to be made and conclusions drawn. *See*, Findings of Fact Nos. 17 and 18 (App. C-6).

statistically significant greater wage increase than did Defendant's white employees (App. C-4).[13]

Blacks employed throughout this time period received an average 23.01% wage increase, while whites averaged only 17.97%, a statistically significant difference amounting to 5 standard deviations.

Findings 11 and 13 make clear the District Court's conclusion that any "differences in wage increases ... or claimed differences in upward mobility between black and white employees, were due to specific individual attributes of Defendant's employees" and "were not due to ... race" (App. C-4, C-5). These findings credit the testimony of Defendant's Director of Personnel, Herman Koehn, who identified by name all black employees hired prior to 1/1/60 and still employed on 5/10/74 and all black employees hired prior to 7/2/65, earning less than $7,000.00 in 1965, and still employed as of 5/10/74. Mr. Koehn, based on his approximately seventeen years of experience in personnel at Uncle Ben's, provided detailed, specific and individualized facts explaining why the upward mobility of these identified black employees, to the extent it had been limited, was limited.[14]

Clearly, based upon the foregoing, it cannot be said that the District Court failed to properly address whether promotions occurred at Uncle Ben's and, if so, whether there were any differences respecting promotions, or upward mobility, as between Defendant's black and white employees. The Fifth Circuit, however, ignored the foregoing findings and remanded the case to the District Court to do that which the District Court *already has done.*

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[13] Contrary to the Fifth Circuit's assertion, Finding 12 does not commingle promotions with lateral hires. In response to Plaintiff's allegations of differences in black-white "upward mobility," Finding 12 addresses black-white wage increases and is *limited to individuals employed by Uncle Ben's throughout the relevant time frame.* It has nothing to do with hiring.

[14] *See* note 6, *supra.*

The unnecessary remand of the instant case to the District Court is the result of the Fifth Circuit's loss of perspective on the role of statistical evidence in assessing claims of employment discrimination. As the District Court stated, it is against the law to discriminate on the basis of race; it is not against the law to violate the rules of mathematical probability. The inaccuracy of the Fifth Circuit's assessment of this statement cannot be allowed to stand if statistical evidence is to advance, rather than obscure, the judicial process in civil rights litigation.

II. THE UNQUALIFIED USE OF STATIC WORKFORCE DATA TO ESTABLISH A *PRIMA FACIE* CASE OF PROMOTION DISCRIMINATION AND THE REJECTION OF COMPARISONS TO EXTERNAL LABOR FORCE DATA CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

Without qualification, the Fifth Circuit embraced the theory that a *prima facie* case of promotion discrimination can be established through static workforce data showing that as of a particular date the percentage representation of a protected class in upper level positions differs from that group's percentage representation in lower level positions.[15] According to the Fifth Circuit, for example, a *prima facie* case of promotion discrimination is established where the black representation in upper level positions, e.g., 20%, is less than the percentage black representation in lower level positions, e.g., 50%. Moreover,

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[15] According to the Fifth Circuit, "Plaintiff's case of employment discrimination against blacks showed that the proportion of that group in each job grade did not reflect the proportion of blacks available for promotion from lower job levels" (App. A-10). In support of this statement, the Circuit footnoted certain static workforce data evidencing a differential in the percentage representation of blacks in higher and in lower job grades, stating "[t]he overall pattern appeared to be one of blacks being clustered in the lowest paying jobs" (App. A-10, n.2.). Neither Plaintiff nor the Fifth Circuit was concerned with whether those blacks "available for promotion from lower job levels" were qualified for such promotion.

again according to the Fifth Circuit, rebuttal evidence which shows that the distribution of protected class members (blacks) in the employer's workforce compares favorably with their distribution throughout similar job levels and positions within the external labor market is *irrelevant* (App. A-15). This approach and the holding as to the relevancy of external labor market availability data conflict with decisions of this Court and other Circuits.

Where, as here, special skills and qualifications are required for promotion to particular jobs,[16] comparative statistics must be limited to members of the protected group who possess such requisite skills and qualifications. *Hazelwood School District* v. *United States, supra* at 308 n.13. Indeed, following this Court's reasoning in *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 620 (1974), unless "it can be assumed that all [of Uncle Ben's employees] are fungible for purposes of determining whether members of a particular class have been lawfully excluded," a comparison *without regard to qualifications* of the percentage of black employees holding lower level positions to the percentage holding upper level positions is meaningless. Unless the promotion position is one for which all employees are presumptively qualified, general workforce figures are not, for statistical analysis purposes, significantly dissimilar from "general population statistics" which even the Fifth Circuit recognized in *Hester* v. *Southern Railway Company, supra* at 1378, n.6., are "of questionable value when . . . considering positions for which, as here, the general population is not presumptively qualified."

This point has been expressly recognized by the Ninth Circuit in *Pack* v. *Energy Research & Development Administration*, 566 F.2d 1111 (9th Cir. 1977), *citing Mayor of Philadelphia* v.

[16] *See* Note 5, *supra*.

Educational Equality League, supra, at 620. Expressing agreement with the lower court's finding that plaintiff's statistical evidence failed to establish a *prima facie* case of promotion discrimination, the Ninth circuit stated:

> [Plaintiff] proved that on a given date at the [employer's] facility, approximately 98% of the employees at grades GS-11 and above were males, whereas 95% of the lower-grade professionals were females. No evidence whatsoever was introduced to demonstrate that the lower-level professional women were qualified to occupy the higher positions. . . .

Pack, supra at 1113.

In response to static workforce data showing that as of March 31, 1974, the percentage of blacks employed in Defendant's lower (generally unskilled) job zones exceeded the percentage employed in higher (generally skilled) job zones, Defendant established that the employment of blacks throughout its job zones was not suggestive of a pattern of discrimination. The District Court specifically found:

> 14. As of March 31, 1974, the Defendant employed 141 blacks out of a total workforce of 394 employees. Considering the job classifications utilized at Defendant's facilities and the necessary requirements for those jobs, and based upon the 1970 United States Census availability data, . . . the Defendant employed an equitable number of blacks in view of their availability within the Houston SMSA. (Finding of Fact No. 14, App. C-5).

Erroneously focusing exclusively on Finding 14, the Fifth Circuit concluded that the District Court's finding of no violation of Title VII was singularly bottomed upon "the favorable statistical comparison between Uncle Ben's at various levels and similar Houston SMSA job levels" (App. A-13). Ignoring the multiple findings discrediting and rebutting Plaintiff's *prima facie* case of statistical disparity, the Fifth Circuit directed that in considering whether Uncle Ben's has rebutted or discredited Plaintiff's

prima facie case "statistics comparing Uncle Ben's workforce to the external labor market are irrelevant" (App. A-15).

While comparing the composition of employees promoted against the internal pool of employees *qualified* for promotion may be of greater relevance, comparisons against external labor market data showing the percentage representation of the protected group who possess the skills and qualifications required for promotion are not irrelevant. In the instant case, Plaintiff made no effort to identify those employees possessing the requisite skills or qualifications required for promotion. Rather, Plaintiff assumed that simply because they were employed at Uncle Ben's all employees were qualified for promotion and, therefore, included all employees in the pool of promotion candidates. In *Teamsters, supra* at 340 n.20, this Court stated that "evidence showing that the figures for the general population might not accurately reflect the pool of qualified applicants would . . . be relevant." This reasoning has equal application to evidence showing that an employer's general workforce figures might not accurately reflect the pool of employees qualified for promotion to upper level positions. Thus, Defendant's comparisons against external labor market figures are clearly relevant since they suggest that Uncle Ben's general workforce figures do not accurately reflect the percentage of blacks in lower level jobs qualified for promotion.

Defendant's extenal labor market data, which reflects the distribution of skills and abilities in the Houston SMSA, reveals that only a small percentage of blacks possess highly technical, professional or craftsmen skills. In contrast, the percentage of blacks who possess relatively no skills is substantially higher than the percentage of whites. It is not surprising, therefore, that a larger number of blacks at Uncle Ben's are located in the lower level jobs that require limited skills and qualifications and that fewer blacks occupy jobs requiring skills and qualifications that cannot be acquired simply by working at Uncle Ben's.

Since a great many of the upper level positions require qualifications not presumptively possessed by the general population or workforce and which are not generally obtained through on-the-job experience at Uncle Ben's, there is no reason to suspect that the internal availability of qualified candidates for upper level positions differs from the external availability. Clearly under these circumstances, it cannot be assumed that because you have "X" number or percentage black employees in lower level positions that you should have that same percentage black representation in upper level positions. Thus, a comparison of the distribution of blacks within Uncle Ben's job levels against black distribution in "similar Houston SMSA job levels" is indeed relevant. And since this comparison is favorable, it serves as rebuttal evidence to any *prima facie* showing of promotion discrimination which may be based upon static workforce figures. Moreover, it suggests that Defendant's employment practices overall, including promotion practices, are not racially discriminatory.

The relevance of external labor market comparisons in a promotion context has explicity been recognized by the Fourth Circuit. Where special skills are required, external workforce comparisons, while not necessarily controlling as to the available labor pool, "may nonetheless be relevant." *EEOC* v. *Radiator Specialty Company*, 610 F.2d 178, 186 (4th Cir. 1979). "[P]roper regard must be given to . . . qualified labor market statistics in the absence of evidence indicating the actual percentage of blacks in lower positions who possess the required qualifications." *Radiator Specialty, supra* at 186-87.

In *Hill* v. *Western Electric Company, Inc.*, 596 F.2d 99 (4th Cir. 1979), the court accepted testimony that experience, job knowledge and skills were important factors in the process of selecting people for promotion. *Hill, supra* at 105-106. In determining whether there was discrimination in the rate of promotion, the *Hill* court analyzed statistical evidence which

indicated the number of people qualified for promotion based on their length of experience in the hourly labor pool and compared with the local Washington SMSA data. The court noted, for example, that 9.8% of those promoted to salaried positions during the relevant time were black, while only 7% of blacks in the hourly paid workforce at that time had as much as ten years experience. Relevant labor force SMSA data suggested only 4% of the labor force, however, were qualified to fill the positions in question.

The Fifth Circuit's holding that external workforce data is irrelevant on the issue of discrimination in promotions is at odds with the foregoing Fourth Circuit decisions. Likewise, its approval of the unqualified use of static workforce data to establish a *prima facie* case of promotion discrimination conflicts with decisions of this Court and the Ninth Circuit. This Court, accordingly, should grant certiorari to resolve these issues in order to ensure consistency and uniformity among the Circuits addressing statistical evidence in promotion cases.

III. THE FIFTH CIRCUIT'S HOLDING THAT DEFENDANT MUST PROVE THE EXISTENCE OF LEGITIMATE, NONDISCRIMINATORY REASONS BY A PREPONDERANCE OF THE EVIDENCE CONFLICTS WITH DECISIONS OF THIS COURT AND THE FIRST CIRCUIT.

In *McDonnell Douglas Corp.* v. *Green, supra* at 802-05, the Supreme Court held that once the Plaintiff has proven the elements of a *prima facie* case, "the burden then must shift to the employer . . . to *articulate* some legitimate, nondiscriminatory reasons for [its personnel action]." When the defendant has articulated a legitimate reason for its action, it becomes plaintiff's burden to demonstrate that the reason articulated is merely a pretext. The mechanics of burden shifting in *McDonnell Douglas* and the meaning of the word "articulate" have caused "no little difficulty among courts." *Loeb* v. *Textron, Inc.*, 600

F.2d 1003, 1011 (1st Cir. 1979). In the instant decision, the Fifth Circuit interpreted *McDonnell Douglas* to require Defendant to prove the "existence of legitimate, nondiscriminatory reason for [its] action by a preponderance of the evidence" (App. A-10). The requirement that Defendant *prove* its reliance on legitimate, nondiscriminatory reasons was first announced by the Fifth Circuit in *Turner* v. *Texas Instruments, Inc.* 555 F.2d 1251, 1255 (5th Cir. 1977), [17] and was reaffirmed in *Burdine* v. *Texas Department of Community Affairs,* 605 F.2d 563 (5th Cir. 1979), petition for cert. granted, No. 79-1764, 48 U.S.L.W. 3813 (June 17, 1980), (Arg. December 9, 1980). The propriety of this standard is now before this Court on writ of certiorari.

The Fifth Circuit's holding that "articulate" means "prove" is contrary to this Court's decision in *Board of Trustees of Keene State College* v. *Sweeney,* 439 U.S. 24 (1978). In *Sweeney,* the Court rejected the First Circuit's holding whereby it interpreted "articulate" to include proof of the absence of discriminatory motive. The Court remanded the case, noting that "there is a significant distinction between merely 'articulat[ing] some legitimate nondiscriminatory reason and prov[ing] absence of discriminatory motive." *Sweeney, supra* at 25. Significantly, the majority and dissent in *Sweeney* agreed that "the employer's burden is satisfied if he simply 'explains what he has done' or 'produce[s] evidence of legitimate nondiscriminatory reasons.' "

[17] In *Texas Instruments,* the Fifth Circuit sought to resolve confusion generated by differing standards announced in two prior decisions. The resolution it adopted was to reject the standard announced in *Peters* v. *Jefferson Chemical Co.,* 516 F.2d 447 (5th Cir. 1975), that "the employer's burden is only one of production — coming forward with legitimate, nondiscriminatory reasons for the [action]," and holding the proper standard to be that "the employer bears the burden of proving the legitimate, nondiscriminatory reasons for its actions by a preponderance of the evidence." *Texas Instruments, supra* at 1255.

Id. at 25, n. 2[18]. *Sweeney* should have made clear to the Fifth Circuit that the burden to articulate is not a burden of persuasion, i.e., to prove the existence of nondiscriminatory reasons, but a burden of production — to articulate or state a valid reason. *Loeb* v. *Textron, Inc., supra* at 1011.

In *Sweeney*, the First Circuit had required the defendant to prove absence of discriminatory motive. The Fifth Circuit in this case has, in effect, imposed the same burden on Uncle Ben's. If Defendant proves by a preponderance of the evidence that its actions were based on legitimate reasons, it necessarily also proves the absence of discriminatory motive. The third step of the *McDonnell Douglas* test is rendered superfluous.

> If an employer were to *prove* that he was motivated by a legitimate reason, there would be no room left for showing that reason was a "pretext", as a pretext is "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs," Webster's Third New International Dictionary (1971). To say, as the court did here that the defendant must prove that its action *was* based on a legitimate reason *and* that the plaintiff must "then" prove that it was not, is contradictory.

Loeb v. *Textron, Inc., supra* at 1012.

Because of the obvious importance of burden of proof issues in employment discrimination cases, certiorari should be granted.

IV. THE FIFTH CIRCUIT'S TREATMENT OF THIS CASE AS ONE OF DISPARATE IMPACT IS CONTRARY TO *INTERNATIONAL BROTHERHOOD OF TEAMSTERS V. UNITED STATES AND FURNCO CONSTRUCTION CORP. V. WATERS*

Although its opinion is not a model of clarity, the Fifth Circuit apparently believes this to be a "disparate impact" case as

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[18] *Compare* 439 U.S. 24, 28-29 (Stevens J., dissenting). "In litigation the only way a Defendant can 'articulate' the reason for his action is by *adducing evidence that explains what he has done* . . ." (emphasis supplied).

to which "[t]he class plaintiffs do not need to prove knowing and intentional discrimination" (App. A-6). While Defendant established the absence of a statistical pattern of differences or disparity in promotion as between Uncle Ben's black and white employees and the existence of legitimate nondiscriminatory reasons for any claimed differences, the suggestion that Plaintiff need not prove that the challenged actions were "racially premised" is erroneous. This case should properly be analyzed under the disparate treatment theory. *McDonnel Douglas Corp.* v. *Green, supra; Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978).

Although Plaintiff generally claimed that blacks suffered limited upward mobility, such limitations were not ascribed to any particular employment practice of Defendant, much less to any objective or facially neutral practices. Plaintiff simply contended that blacks suffered limited upward mobility because of their race and attempted to establish a pattern of disparity through statistical analyses comparing the monetary advancement over time of Defendant's black and white employees. No effort was made to correlate such analyses with any employment standard or requirement.

In order to establish a *prima facie* case on a *disparate impact* claim, Plaintiff must demonstrate that an objective, identifiable practice, neutral both on its face and its intent, e.g., an employment test, operates to exclude minorities. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-32 (1971); *Teamsters, supra*, at 335 n.15. While *Griggs* and its broad language have been often cited, it is clear that application of the disparate impact theory is not without limits. In *Furnco Construction Corp.* v. *Waters, supra*, which involved an allegedly discriminatory hiring procedure based upon subjective management decisions, the Supreme Court emphasized this limitation. The Seventh Circuit, in assessing the applicability of the *Griggs* "principle," stated: "This is not a case, like *Griggs*, of comparing white and black applicants

by *objective but irrelevant standards*, and rejecting more blacks, proportionately, than whites." *Waters* v. *Furnco Construction Corp.*, 551 F.2d 1085, 1089-90 (7th Cir. 1977) (emphasis supplied). In agreeing with the Seventh Circuit that the case properly should be analyzed under the disparate treatment rationale of *McDonnell Douglas, supra*, this Court noted:

> This case did not involve employment tests, which we dealt with in *Griggs* v. *Duke Power Co., supra*, and in *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 412-12, 10 FEP Cases 1181, 1185 (1975), nor particularized requirements such as height and weight specifications considered in *Dothard* v. *Rawlinson*, 433 U.S. 321, 329, 15 FEP Cases 10, 13 (1977), and it was not a "pattern or practice" case like *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358, 14 FEP Cases 1514, 1529, (1971).

Furnco, supra, at 4968 n.7. *Furnco* thus expressly recognizes that the disparate impact theory is limited to facially neutral, "objective but irrelevant" employment practices.

Teamsters, supra, also emphasizes the distinction between allegations of disparate treatment and disparate impact.

> "Disparate treatment" such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are *facially neutral* in their treatment of different groups but that in fact fall more harshly on one group than another. . . .

Teamsters, supra at 335 n.15.

For analytical purposes, the instant case is indistinguishable from the pattern and practice allegations under Title VII

addressed in *Teamsters, supra.* In both cases, it was alleged that the defendant employer failed to treat minority group members on an equal basis with white people.[19] Expressly recognizing that such allegations fall under the "disparate treatment" theory, *Teamsters, supra* at 335 n.15, this Court recognized that "[t]he ultimate factual issues are thus simply whether there was a pattern or practice of such disparate treatment and, if so, whether the differences were 'racially premised.' " *Teamsters, supra* at 335, quoting *McDonnell Douglas, supra* at 805 n.18. Likewise, in the instant case, even if a pattern of differences in treatment, as alleged, is established through statistical evidence, it remains Plaintiff's burden to prove that such differences were "racially premised."[20]

The Fifth Circuit failed to recognize the limitations on the disparate impact theory in the instant case, apparently assuming that classwide claims automatically raise the issue of disparate

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[19] See also, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), in which the principles of *McDonnell Douglas* were applied "in the context of a class action." *Teamsters, supra* at 858-59.

[20] The Fifth Circuit erroneously ignored the fact that this case is primarily under 42 U.S.C. §1981, not Title VII. Suit was initially filed under §1981. The pre-trial order stated the issues in terms of determining discrimination from and after March 28, 1972. This time frame limitation under §1981 is consistent with *Johnson* v. *Goodyear Tire & Rubber Co., supra.* The Title VII allegations were not added until September 12, 1975, with the relevant time frame under Title VII commencing August 19, 1973 — 180 days prior to the filing of the underlying EEOC charge. *United Airlines* v. *Evans, supra.* Thus, under any theory, purposeful discrimination must be shown for that part of the relevant time frame covered only by §1981 — March 28, 1972 to August 19, 1973. *See Washington* v. *Davis,* 426 U.S. 229, 239-40 (1976); *Crawford* v. *Western Electric Co.*, 614 F.2d 1300, 1308-09 (5th Cir. 1980); *Grigsby* v. *North Mississippi Medical Center, Inc.*, 586 F.2d 457, 460-61 (5th Cir. 1978); *Williams* v. *DeKalb County*, 582 F.2d 2, 3 (5th Cir. 1978).

impact irrespective of whether or not such claims allege discrimination as the result of facially neutral, objective employment practices. This failure and the confusion it will inevitably generate should be addressed and remedied by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Neil Martin, attorney for Petitioner Uncle Ben's, Inc., do hereby certify that on this 20th day of February, 1981, three copies of the foregoing petition were mailed to each of the following counsel of record for the Plaintiff in this proceeding:

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FILED
FEB 23 1981
ALEXANDER L. STEVAS,
CLERK

80-1420

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

No. .....

UNCLE BEN'S, INC.,

Petitioner,

v.

THOMAS JOHNSON, Individually, and on Behalf of all Others Similarly Situated,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

THOMAS JOHNSON INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants.

v.

UNCLE BEN'S, INC.,

Defendant-Appellee.

No. 78-1437.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

OCT. 17, 1980.

Class action was brought on behalf of class of black persons and Mexican-American persons alleging that employer had engaged in a variety of discriminatory employment practices. The United States District Court for the Southern District of Texas, 615 F.2d 917, Ross N. Sterling, J., dismissed all claims relating to Mexican-Americans, most of the claims relating to blacks and entered judgment in favor of employer on the remaining issue, and appeal was taken. The Court of Appeals, Vance, Circuit Judge, held that: (1) trial court adopted an erroneous notion of controlling legal principles regarding use and role of statistics in employment discrimination case; (2) dismissal of claims regarding Mexican-Americans would be without prejudice where trial court failed to rectify the situation when it became apparent that plaintiffs did not adequately represent class of Mexican-Americans; and (3) case would be remanded for preparation of new findings on discriminatory impact with regard to promotion of blacks.

Modified and affirmed in part; reversed in part and remanded.

Daniel Holcombe Thomas, District Judge, filed dissenting opinion.

1. Civil Rights 44(1)

Where gross statistical disparities can be shown, they alone may constitute prima facie proof of pattern of practice of discrimination in employment.

2. Civil Rights 43

Plaintiffs in a class action employment discrimination case do not need to prove knowing and intentional discrimination to prove a disparate impact case nor must plaintiffs prove a racially disproportionate impact with complete mathematical certainty.

3. Federal Courts 850

Clearly erroneous standard of review does not apply to findings of fact premised upon an erroneous view of controlling legal principles.

4. Federal Courts 858

District court's findings in employment discrimination case, which were based on erroneous notion of controlling legal principles regarding use and role of statistics, were not entitled to any deference on appeal.

5. Civil Rights 44(1)

There was no substantial evidence before court of discriminatory employment practices against Mexican-Americans during period covered by the suit and therefore trial court properly dismissed claims regarding upon Mexican-Americans.

6. Federal Civil Procedure 173

In class action, trial court has duty to supervise plaintiffs' presentation to safeguard rights of class being represented. Fed. Rules Civ.Proc. Rule 23, 28 U.S.C.A.

7. Federal Civil Procedure 173, 176, 1827

When it became apparent that plaintiffs, who brought class action on behalf of class of black persons and Mexican-American persons alleging discriminatory employment practices, did not adequately represent Mexican-Americans, trial court should have taken action such as dividing certified class into separate subclass for Mexican-American members, decertifying that class, or certifying a second class and to remedy trial court's failure in such respect, trial court's dismissal of all claims regarding Mexican-Americans would be without prejudice. Fed.Rules Civ.Proc. Rule 23(c)(4), 28 U.S.C.A.

8. Civil Rights 43, 44(4)

Plaintiffs' statistical evidence and testimonial evidence made out a prima facie showing of discrimination against blacks with regard to promotions and therefore burden shifted to employer to go forward with evidence as to either existence of legitimate, nondiscriminatory reasons for its actions by a preponderance of the evidence or total unacceptability of plaintiff's statistical proof. Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C.A. § 2000e *et seq.*

9. Civil Rights 44(4)

If employer ordinarily employed individuals for upper level positions by hiring laterally from outside company, then relevant statistical comparison for determining validity of allegations that employer discriminated against blacks in promotion practices would be between black/white ratio in each of employer's jobs and general or qualified outside labor force and if employer promoted from within, statistical comparison would be against employer's internal work force. Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C.A. § 2000e *et seq.*

10. Civil Rights 46

In class action alleging that employer discriminated against blacks with regard to promotions, trial court erred in tacitly approving part of employer's promotion system which was based on use of subjective supervisory evaluations made by groups of white supervisors.

11. Civil Rights 2

Title VII was specifically designed to remove artificial, arbitrary, and unnecessary barriers to employment when barriers operate invidiously to discriminate on basis of racial or other impermissible classification. Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C.A. § 2000e *et seq.*

12. Civil Rights 9.13

Educational requirement for a job is lawful if it is required by business necessity and valid under EEOC's uniform guidelines on employee selection procedures. Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C.A. § 2000e *et seq.*

Appeal from the United States District Court for the Southern District of Texas.

ON PETITION FOR REHEARING

Before VANCE and SAM D. JOHNSON, Circuit Judges, and THOMAS*, District Judge.

VANCE, Circuit Judge:

The motion for rehearing is granted, 615 F.2d 917 (5th Cir.). This panel's unpublished opinion of April 11, 1980, 615 F.2d 917 (5th Cir.), is vacated in its entirety.

* District Judge of the Southern District of Alabama, sitting by designation.

I.

This appeal challenges the district court's disposition of a class action brought pursuant to section 1981, 42 U.S.C. § 1981, and Title VII, 42 U.S.C. § 2000e *et seq.* Suing on behalf of a class of black persons and Mexican-American persons who have been, are, or may be, employed by defendant Uncle Ben's, Inc., plaintiffs alleged in their complaint that Uncle Ben's had engaged in a variety of discriminatory employment practices. Specifically, they contended that Uncle Ben's discriminated against both groups in compensation, hiring, promotion, transfer, seniority and other terms and conditions of employment. The district court, however, held that plaintiffs had failed to present a prima facie case showing discriminatory treatment of Mexican-Americans and on all but one issue regarding blacks, and, therefore, it dismissed as to these issues at the conclusion of plaintiffs' case. On that one issue, the district court found that plaintiffs had established a prima facie case of discrimination against blacks in promotion, but ultimately ruled in favor of Uncle Ben's on this point as well.

II.

The district court adopted and applied an erroneous notion of the controlling legal principles regarding the use and role of statistics in an employment discrimination case. In discussing the promotion issue, the district court stated,

> If we accept the Plaintiff's side of the case, all that the experts say, the way I see it, is that *what has transpired in the real world at Uncle Ben's could not have statistically happened by chance.* We are not here to enforce a law which says that things must occur within the limits of mathematical probability. The law says the defendant may not discriminate on the basis of race. *The law does not say that the defendant shall not violate the rules of mathematical probability.*

> A Business such as the Defendant's cannot be run successfully by chance. Decisions as to who may best serve in any given job must be made rationally by persons with sufficient knowledge of the individuals and jobs involved to make such decisions.

(Emphasis added.) This standard is incorrect.

[1, 2] Statistics as to racial composition of the defendant's work force serve an important role in judging employment discrimination cases. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977); *Fisher* v. *Procter & Gamble Manufacturing Co.*, 613 F.2d 527, 543 – 44 (5th Cir. 1980). "Where gross statistical disparities can be shown, they alone may . . . constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood School District* v. *United States*, 433 U.S. 299, 307 – 08, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977). *See also Fisher* v. *Procter & Gamble Manufacturing Co.*, 613 F.2d at 544; *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 225 & n.34 (5th Cir. 1974). The class plaintiffs do not need to prove knowing and intentional discrimination to prove a disparate impact case. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 335 n.15, 97 S.Ct. at 1854 – 1855 n.15; *Scott* v. *City of Anniston*, 597 F.2d 897, 898 (5th Cir. 1979), *cert. denied* —— U.S.——, 100 S.Ct. 1850, 64 L.Ed.2d 271 (1980). Nor must the plaintiffs prove a racially disproportionate impact with " 'complete mathematical certainty.' " *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 337 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978) (quoting *Vulcan Society of the New York City Fire Department, Inc.* v. *Civil Service Commission*, 490 F.2d 387, 393 (2d Cir. 1973)).

[3, 4] The clearly erroneous standard of review does not apply to findings of fact premised upon an erroneous view of controlling legal principles. *Parson* v. *Kaiser Aluminum &*

Chemical Corp., 575 F.2d 1374, 1382 (5th Cir. 1978), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1372 n.20 (5th Cir. 1974). The district court's findings based on its misunderstanding of this legal standard are entitled to no deference. We must undertake an independent analysis of the record before us in light of the correct legal standards.

III.

Plaintiffs alleged that between 1972 and the institution of this suit in 1974, and as far back as 1960,[1] Mexican-American workers, who comprise nine percent of Houston's labor market, constituted only four percent of Uncle Ben's employees. This gross disparity between Uncle Ben's workforce and the relevant labor market, which is statistically significant, ordinarily would satisfy plaintiff's initial burden of establishing a prima facie case of hiring discrimination. *Hazelwood School District* v. *United States*, 433 U.S. at 307 – 08, 97 S.Ct. at 2741 – 2742; *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d at 225 & n.34. Despite Uncle Ben's' contrary claims, we ascribe no affirmative legal significance to Uncle Ben's' increase in the number of its Mexican-American employees subsequent to the filing of this suit. *International Brotherhood of Teamsters* v. *United States*,

[1] Discrimination prior to the effective date of Title VII, July 2, 1965, can be considered under two theories. Since the appellant's allegations are also made under 42 U.S.C.A. § 1981, employment practices prior to 1965 may be examined. Secondly, this court specifically explained in *United States* v. *Jacksonville Terminal*, 451 F.2d 418, 441 (5th Cir. 1971), *cert. denied* 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972), and *affirmed* in *Burns* v. *Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir. 1973), that pre-act discriminatory conduct is highly relevant, especially, when considering neutral practices under Title VII alleged to carry forward past discriminatory effects. *See United States* v. *Dillon Supply Co.*, 429 F.2d 800 (4th Cir. 1970). *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d at 218 n. 10. *See also Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 309 n. 15, 97 S.Ct. at 2742 – 2743 n. 15, 53 L.Ed.2d 768 (1977).

431, U.S. at 341 – 42, 97 S.Ct. at 1857 – 1858; *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d at 1385 – 86.

This case nevertheless raises a difficult problem involving whether there was evidence of Uncle Ben's substantial underutilization of Mexican-Americans at the close of plaintiffs' direct case. Uncle Ben's asserts that the district court properly dismissed plaintiffs' allegations of discrimination against Mexican-Americans because at the close of plaintiffs' case the record was devoid of evidence supporting such allegations. We agree.

[5] Plaintiffs' case regarding Mexican-Americans rested on the testimony of their expert, Richard Alfred Tapia, to the effect that Uncle Ben's substantially underutilized Mexican-Americans. On cross examination, however, Dr. Tapia disclosed that he had relied on statistics relating to 1975, more than a year after suit was filed. He conceded that he had no information regarding the number of Mexican-Americans employed and terminated during the period covered by the suit. He conceded further that the basis for his opinion did not include prior interviews with any of Uncle Ben's' employees or an examination of any of the company's personnel files. Dr. Tapia relied instead on Uncle Ben's' answers to interrogatory number 13 alone, which Dr. Tapia acknowledges he incorrectly assumed to relate to 1974. In fact, the information related to September 12, 1975. This interrogatory answer was introduced into evidence. Plaintiffs' counsel failed to offer other available evidence that contained the 1974 data that would have established a prima facie case of discrimination. Because there was no substantial evidence before the court of discrimination during the period covered by the suit, the district court correctly dismissed the claim regarding Mexican-Americans. Plaintiffs' counsel never sought to have the claim reopened when the availability of the needed data became evident.

IV.

The district court originally, and at the time quite correctly, determined that plaintiff would adequately represent the certified class of blacks and Mexican-Americans. At trial, however, representation of the class of Mexican-Americans was not adequate. The thrust of plaintiff's direct case concerned the situation involving black employees. Although this may well have been necessary on the issue of promotion considering the small number of Mexican-Americans employed by Uncle Ben's, plaintiffs' preoccupation with the issue of black promotion seemingly led them to omit to introduce into evidence the number of Mexican-Americans hired by Uncle Ben's.

[6, 7] Under Rule 23 of the Federal Rules of Civil Procedure, the trial court has a duty to supervise plaintiffs' presentation to safeguard the rights of the class being represented. *Grigsby* v. *Northern Mississippi Medical Center, Inc.*, 586 F.2d 457, 462 (5th Cir. 1978); *Guerine* v. *J & W Investment, Inc.*, 544 F.2d 863, 864-65 (5th Cir. 1977). When it became apparent that plaintiffs did not adequately represent the Mexican-Americans, the trial court should have taken action such as dividing the certified class into a separate subclass for the Mexican-American members, *see* Fed.R.Civ.P. 23(c)(4), decertifying that class, or certifying a second class. To remedy the trial court's failure in this respect we now hold that dismissal of all claims regarding Mexican-Americans is without prejudice. This judgment does not have res judicata effect against them in light of plaintiffs' total failure adequately to represent them. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 691, 81 S.Ct. 1309, 1314, 6 L.Ed.2d 604 (1961) ("the judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation"); *Grigsby* v. *North Mississippi Medical Center*, 586 F.2d at 461-62; *Gonzales* v. *Cassidy*, 474 F.2d 67, 73-75 (5th Cir. 1973).

V.

Plaintiffs' case of employment discrimination against blacks showed that the proportion of that group in each job grade did not reflect the proportion of blacks available for promotion from lower job levels.[2] Plaintiffs further alleged that Uncle Ben's filled its better jobs generally by promoting employees from within the firm rather than making lateral hires from without. Blacks, therefore, tended to remain in those low paying, entry level positions while similarly situated whites advanced upward from such positions.

[8] The district court correctly determined that plaintiffs' statistical evidence and testimonial evidence made out a prima facie showing of discrimination against blacks on the promotion issue. *E.g., Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1185-86 (5th Cir.), *cert. denied*, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139 (1976); *Rowe* v. *General Motors Corp.*, 457 F.2d 348,357 (5th Cir. 1972). Uncle Ben's then had the " 'onus of going forward with the evidence and the burden of persuasion,' " *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d at 330 (quoting *United States* v. *Hayes International Corp.*, 456 F.2d 112, 120 (5th Cir. 1972)), as to either the existence of "legitimate, nondiscriminatory reasons for [its] action by a preponderance of the evidence," *Turner* v. *Texas Instruments, Inc.*, 555 F.2d 1251, 1255 (5th Cir. 1977), or the total unacceptability of plaintiffs' statistical proof, *see EEOC* v. *Datapoint Corp.*, 570 F.2d 1264,1269 (5th Cir. 1978) ("statistics must be relevant, material

[2] Plaintiffs' demonstrated, *inter alia*, that of the 172 plant hourly positions, 118 such positions were held by blacks (68.6%). In the next four higher zones, blacks held 30 of the 67 positions (44.8%). Taking higher plant hourly pay zones into account as well as all office hourly jobs and the salaried jobs, blacks represented 35.8% of Uncle Ben's total work force. The overall pattern appeared to be one of blacks being clustered in the lowest paying jobs. Even those few blacks who entered the generally more desirable salaried jobs tended to be clustered in the least remunerative and responsible jobs at those levels.

and meaningful, and not segmented and particularized and fashioned to obtain a desired conclusion"); *Robinson* v. *Union Carbide Corp.*, 538 F.2d 652, 658 (5th Cir. 1976), *cert. denied*, 434 U.S. 822, 98 S.Ct. 65, 54 L.Ed.2d 78 (1977); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d at 1371.

The trial court held that plaintiffs' prima facie case had been rebutted by Uncle Ben's evidence showing both the absence of discriminatory impact and the presence of "legitimate, nondiscriminatory" explanations for the status quo. Plaintiffs did not introduce evidence that these explanations were pretextual.

The findings regarding the absence of discriminatory impact are, in pertinent part, as follows:

> 11. Plaintiff also introduced through Dr. Tappia [sic] evidence of differences in upward mobility-wage increases received by Defendant's black and white employees. . . . Such evidence does not, however, when considered in conjunction with countervailing evidence of individual cases offered by Defendant, establish discriminatory treatment of Defendant's black employees.
>
> 12. During the period from August 8, 1971 through May 10, 1974, limiting the analysis to employees who were employed on both dates, Defendant's black employees received a statistically significant greater wage increase than did Defendant's white employees. . . . Further, . . . the Court finds that the percentage increase in black wages exceeded the percentage increase in white wages regardless of whether or not individuals in job classifications falling within the EEOC category "Officials & Managers" are included. . . . Utilizing salary level groupings suggested by Plaintiff's Exhibit No. 8, e. g., employees earning less than a given amount, any differences in black-white wage increases during the 1971-74 period were not statistically significant.

13. The Court finds that any differences in wage increases received by black and white employees, or claimed differences in upward mobility as between black and white employees, were due to specific individual attributes of Defendant's employees. Such differences were not due to the race of the employee concerned. The referenced attributes or upward mobility factors include, for example, limited ability to read, write and make numerical calculations; promotion refusals; demotion requests; non-shift work requests; lack of interest in changing jobs; and performance shortcomings.

14. As of March 31, 1974, the Defendant employed 141 blacks out of a total work force of 394 employees. Considering the job classifications utilized at defendant's facilities and the necessary requirements for those jobs, and based upon the 1970 United States Census availability data, the Court finds the Defendant employed an equitable number of blacks in view of their availability within the Houston SMSA.

* * * *

19. In terms of the number of employees promoted, their time in grade prior to promotion and the wage increases received upon being promoted, the Court finds that there has been no statistically significant difference in the treatment of Defendant's black and white employees.

The district court's findings concerning legitimate, nondiscriminatory reasons are, in relevant part, as follows:

15. The large number of black employees employed within defendant's lower job zones is not the result of racial discrimination.

16. The Court finds, based upon the testimony of Dr. Richard Jeanneret, an expert in the field of industrial

psychology and job analysis, that Defendant's requirements for its jobs are valid, job-related and necessary. The Court further finds that certain of Defendant's jobs require knowledge and skills not obtainable through on-the-job or internal Company training or experience.

17. The job classifications/positions within Defendant's Office differ greatly from those within its Plant. They involve and require different skills, knowledge and training.

18. Because of the Office-Plant differences, and because the lines of progression and patterns of promotion respecting wage differentials and time in grade differ significantly, statistical analyses which separate Office and Plant employees are proper and allow meaningful comparisons to be made and conclusions to be drawn. The joinder or lumping together of Office and Plant employees does not provide a meaningful or valid basis for comparing the treatment of black and white employees.

On the discriminatory impact issue, Uncle Ben's persuaded the district court that the black/white ratio in each of Uncle Ben's job levels should be compared to the black/white ratio in comparable jobs in the Houston SMSA, and not compared to the black/white ratio in the relevant lower job level(s) at Uncle Ben's. The district court accepted this argument and, because of the favorable statistical comparison between Uncle Ben's at various levels and similar Houston SMSA job levels, found that Uncle Ben's had not violated Title VII.

[9] The dispositive issue is whether Uncle Ben's ordinarily employs individuals for upper level positions by hiring laterally from outside the company or by promoting from within. If it hires laterally, the relevent comparison is to the general or qualified outside labor force. If Uncle Ben's fills jobs by promotion, the relevant comparison, as we recognized in *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d at 331, 341, is the company's internal work force. *Accord, Hereford* v. *Huntsville Board of*

Education, 574 F.2d 268, 272-273 (5th Cir. 1978). The applicability of *James* in any given case turns on whether vacancies in non-entry level positions are or could be filled by promotion. If the vacant positions ordinarily are filled by lateral hires or hiring from among graduates or relevant educational programs, then the rigid *James* rule is inapplicable. *See Mayor of Philadelphia* v. *Educational Equality League,* 415 U.S. 605, 620-21, 94 S.Ct. 1323, 1333-1334, 39 L.Ed.2d 630 (1974); *Hester* v. *Southern Ry.,* 497 F.2d 1374, 1379 n.6 (5th Cir. 1974).

The difficulty is that most cases fall between these extremes of exclusive promotion and of exclusive non-promotion. As a general matter, however, cases are dealt with in terms of the extreme to which they most closely accord. In addition, the necessity of non-promotions in certain jobs — or even in the majority of jobs within a company — should not foreclose an inquiry at trial into whether the remaining jobs filled by promotion are discriminatorily filled.

The district court frankly ignored deciding the questions of whether any promotion or upward mobility occurs at Uncle Ben's, and, if so, whether blacks suffer a disparate impact in seeking promotions. The trial court's findings 11-13 and 19 suggest that promotions occur. Findings 14-16 suggest that no promotions are made from Plant to Office. Yet neither set of findings is necessarily incorrect: Uncle Ben's may fill some of its positions by promotions while it must fill other positions from outside the company. If so, it is insufficient to know that blacks constitute 141 of Uncle Ben's 394 employees. We must know how many of those 394 employees hold jobs that ordinarily cannot be filled by promotion to decide the question of discriminatory impact.

The district court must, therefore, prepare new findings on discriminatory impact. Findings of fact 12 and 14, for example, are useless to the extent they incorporate or commingle facts about lateral hiring. First, the new findings must determine the

number of Uncle Ben's jobs that were filled by promotion and the number that were filled by hiring from the outside of the Uncle Ben's work force. In essence, the absence or presence of blacks in lateral hire positions is generally irrelevant to the question of discrimination in promotion. Because the issue of discrimination in lateral hiring for desirable positions at Uncle Ben's has not been properly raised, the district court must excise facts germane to that issue from its assessment of discrimination in promotion. Second, the district court must decide whether Uncle Ben's has rebutted or discredited plaintiffs' prima facie showing that in promotions blacks are relegated to lower level jobs and are promoted at a significantly slower rate than whites. On this question, statistics comparing Uncle Ben's work force to the external labor market are irrelevant. Third, the district court also must find whether the legitimate nondiscriminatory reasons that it credited, based on a correct view of the controlling legal principles on that point, apply to any of the promotion positions and not just to the lateral hire positions. Given the peculiar nature of this case, on remand the district court will not abuse its discretion if it allows plaintiffs and Uncle Ben's an opportunity to clarify and supplement their original presentations.

The two issues of access-promotion and lateral hiring (including hiring from schools) — should be kept separate in scrutinizing statistical analyses. *Cf. Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d at 1372-73 (statistical consequences of unvalidated testing should not be manipulated by including effects of independent transferral policy). Assuming that Uncle Ben's only hired whites for non-promotion positions, only similarly situated black applicants have suffered discrimination. The class of black laborers who are striving or would be striving but for discrimination, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 363-64, 97 S.Ct. at 1868-1869; *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d at 341-42, for a promotion from within the company to a promotion job may not have been

injured. Similarly, if lateral hires were exclusively black, this would provide little solace for the class of black laborers, and would not mitigate any discrimination suffered in promotions.

VI.

[10] The trial court erred in tacitly approving the part of Uncle Ben's promotion system that is based on the use of subjective supervisory evaluations. We have repeatedly held that subjective selection processes involving white supervisors provide a ready mechanism for racial discrimination. *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d at 1385; *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d at 345; *Rowe* v. *General Motors Corp.*, 457 F.2d at 359.

Uncle Ben's subjective promotion system substantially embodies the mechanisms that we invalidated in *Rowe:*

> (i) The foreman's recommendation is the indispensable single most important factor in the promotion process.
>
> (ii) Foremen are given no written instructions pertaining to the qualifications necessary for promotion. (They are given nothing in writing telling them what to look for in making their recommendations.)
>
> (iii) Those standards which were determined to be controlling are vague and subjective.
>
> (iv) Hourly employees are not notified of promotion opportunities nor are they notified of the qualifications necessary to get jobs.
>
> (v) There are no safeguards in the procedure designed to avert discriminatory practices.

Id. at 358-59 (footnote omitted). *See Wade* v. *Mississippi Cooperative Extension Service*, 528 F.2d 508, 518 (5th Cir. 1976) (§ 1981 standard). These *Rowe* vices are not undone here simply because Uncle Ben's has made certain changes about the

time this suit was instituted. Nor is *Rowe* avoided because subjective decisions are made by a group instead of an individual. *See Robinson* v. *Union Carbide Corp.*, 538 F.2d at 661-62. This is not, moreover, a case of permissible subjectivity. *Davis* v. *Board of School Commissioners*, 600 F.2d 470, 475 (5th Cir. 1979), *modified on other grounds*, 616 F.2d 893 (5th Cir. 1980).

In all likelihood, the district court did not mean to approve Uncle Ben's subjective promotion system. Rather, it probably concluded that *Rowe* was inapplicable because no resulting substantial discrimination existed. *Hester* v. *Southern Ry.*, 497 F.2d at 1381. We hold that Uncle Ben's subjective promotion system fails, unless the district court concludes in light of our instructions in Part V that blacks suffered no discriminatory impact in promotion.

VII.

If the district court finds on remand that a discriminatory impact existed, it must then reexamine its conclusions regarding whether Uncle Ben's educational requirements have been validated. Should such inquiry be necessary, it must be made in light of the following standards and principles.

[11, 12] Title VII was specifically designed to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). *Cf. Miller* v. *International Paper Co.*, 408 F.2d 283, 294 (5th Cir. 1969) ("The ethic which permeates the American Dream is that a person may advance as far as his talents and his merit will carry him.") An educational requirement for a job is lawful if it is required by "business necessity," *Griggs* v. *Duke Power Co.*, 401 U.S. at 431, 91 S.Ct. at 853-854; *Payne* v. *Travenol Laboratories, Inc.*, 565 F.2d 895, 899-900 (5th Cir.), *cert. denied*, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978), and valid under the EEOC's Uniform Guidelines on

Employee Selection Procedures, 29 C.F.R. § 1607 (1979); *see Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975). *See generally Griggs* v. *Duke Power Co.,* 401 U.S. at 431-33, 436, 91 S.Ct. at 853-854.[3] An educational requirement is not a measure of probable performance for many jobs at Uncle Ben's. *See Watkins* v. *Scott Paper Co.,* 530 F.2d at 1181-82 & n. 30. This test of "justified business necessity" may, of course, be relevant, leaving aside the question of discriminatory impact, to the question on remand whether certain jobs are filled by promotion or lateral hiring.

MODIFIED AND AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

DANIEL HOLCOMBE THOMAS, District Judge, dissenting:

This writer respectfully dissents. In the course of rendering its decision the district court stated "that what has transpired . . . at Uncle Ben's could not have statistically have [sic] happened by chance," yet "[t]he law does not say that the defendant shall not violate the rules of mathematical probability." Although this and similar statements indicate the Court's confusion as to the role of statistics in cases of this sort, *e. g., Fisher* v. *Proctor & Gamble Mfg. Co.,* 613 F.2d 527, 544 (5th Cir. 1980). I would affirm because, when evaluated on legally sufficient grounds, the district court's findings regarding the lack of discrimination in the promotion of blacks at Uncle Ben's are not clearly erroneous. I would further conclude that the district court did not err in holding that the plaintiffs had failed to establish a *prima facie* case on all issues other than discrimination against blacks with respect to promotions. I would affirm the ruling of the district court.

I dissent.

[3] In certain cases, however, if an employer has never attempted to validate an education requirement criterion, this failure to validate compels the conclusion that the requirement is invalid. *Watkins* v. *Scott Paper Co.,* 530 F.2d at 1182 n. 31.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1437

THOMAS JOHNSON, Individually, etc.,
Plaintiff-Appellant,

v.

UNCLE BEN'S, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

(APRIL 11, 1980)

Before VANCE and SAM D. JOHNSON, Circuit Judges and THOMAS*, District Judge.

PER CURIAM:

This appeal challenges the district court's disposition of a class action brought pursuant to 42 U.S.C. § 1981 and 42 U.S.C. § 2000e *et seq.* Suing on behalf of a class of black persons and Mexican-American persons who have been, are, or may be, employed by defendant Uncle Ben's, Inc., plaintiffs alleged in their complaint that Uncle Ben's had engaged in a variety of discriminatory employment practices. Specifically, they contended that Uncle Ben's discriminated against both groups in compensation, hiring, promotion, transfer, seniority and other

* District Judge of the Southern District of Alabama, sitting by designation.

terms and conditions of employment. The district court, however, held that plaintiffs had failed to present a prima facie case of discriminatory treatment on any issue concerning the Mexican-Americans and on all but one issue regarding the blacks; therefore, it dismissed as to these issues at the conclusion of plaintiffs' case. The district court found that plaintiffs had established a prima facie case of discrimination in the promotion of blacks but ultimately ruled in favor of Uncle Ben's on this issue. We affirm.

In the course of rendering its decision, the district court stated "that what has transpired . . . at Uncle Ben's could not have statistically have [*sic*] happened by chance," yet "[t]he law does not say that defendant shall not violate the rules of mathematical probability." Although this and similar statements indicate the court's confusion as to the role of statistics in cases of this sort, *e.g.*, *Fisher* v. *Proctor & Gamble Mfg. Co.*, . . . F.2d . . . (5th Cir. 1980) [slip op. 3737, 3757], we affirm because, when evaluated on legally sufficient grounds, the district court's findings regarding the lack of discrimination in the promotion of blacks at Uncle Ben's are not clearly erroneous. We further conclude that the district court did not err in holding that plaintiffs had failed to establish a prima facie case on all issues other than discrimination against blacks with respect to promotions.

AFFIRMED.

APPENDIX C

C-1

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THOMAS JOHNSON, Individually
and on behalf of all others
similarly situated

v.

UNCLE BEN'S INC.

CIVIL ACTION NO. 74-H-435

Nelkin & Nelkin (Carol Nelkin), Houston, Texas,
attorneys for Plaintiff.

Fulbright & Jaworski (Robert S. Bambace and
Philip J. Pfeiffer), Houston, Texas,
attorneys for Defendant.

JANUARY 11, 1978

MEMORANDUM:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff's evidence in this case was in large part a presentation of statistical analyses of various aspects of Defendant's employee-employer relationships. Defendant's statistical presentation tended to refute that of Plaintiff in some ways. However, references in these findings of fact concerning statistical significance should not be taken as a dilution of what was announced from the bench as the basis for decision at the end of the evidence:

"First, on statistics. If we accept the Plaintiff's side of the case, all that the experts say, the way I see it, is that what has transpired in the real world at Uncle Ben's could not have statistically happened by chance. We are not here to enforce a law which says that things must occur within the limits of mathematical probability. The law says the defendant may not discriminate on the basis of race. The law does not say that the defendant shall not violate the rules of mathematical probability.

"A business such as the Defendant's cannot be run successfully by chance. Decisions as to who may best serve in any given job must be made rationally by persons with sufficient knowledge of the individuals and the jobs involved to make such decisions.

"Second, having had the opportunity both to see and hear all of the witnesses in this case, I have concluded that any discrimination at Uncle Ben's has been color blind. In this case it has been between individuals without reference to race or other impermissible criterion."

FINDINGS OF FACT

1. Plaintiff Thomas Johnson was employed by Defendant Uncle Ben's, Inc. from November 8, 1964 until his discharge on November 7, 1975. Plaintiff is black.

2. Plaintiff was terminated for violating an established policy of Defendant's regarding the obligation of employees to conduct themselves in accordance with standards of common decency and morality, and specifically prohibiting the making of indecent remarks or advances. In this regard, Plaintiff was terminated for improper conduct on his part as a supervisor *vis-a-vis* a Company employee over whom he exercised supervisory authority. Plaintiff's race was not a factor in his discharge.

3. The hourly job zones within the Plant, which is where Plaintiff was initially employed, range from Zone 1 to Zone 11, with the job classifications within Zone 11 being the highest rated hourly jobs within the Company. In ascending order of pay, Defendant's Salaried Job Zones range from Zone VII to

Zone II, with certain Salaried Job Zones having subgroups such as Zone VI which is broken down into Zones VI-1 and VI-2. Defendant also has a separate job zone structure for office hourly positions, with the Office Hourly Job Zones utilized by Defendant, in ascending order of pay, ranging from Zone 1 through Zone 8.

4. During the period of his employment, November, 1964 to November, 1975, Plaintiff advanced from a job classification within Plant Hourly Job Zone 3 to Accounting Supervisor which is a Salaried Job Zone VI-2 position. From 1967 until 1974 Plaintiff was employed in a Salaried Zone VII position within the Research & Development Division. On or about March 12, 1974, prior to the filing of this action, Plaintiff accepted a transfer from Defendant's Research & Development Division to its Service and Finance Division. The Transfer offer was in response to Plaintiff's request.

5. Although Plaintiff received no promotions during the seven year period he was employed at a Salaried Job Zone VII position in Research & Development, the Court finds that Plaintiff was not treated differently than similarly situated white employees.

6. Although Plaintiff complains that several employees within the Research & Development Division did receive promotions during the time he served in a Salaried Zone VII position, there is no evidence that Plaintiff's race was a factor in any of these promotion decisions or that Plaintiff was qualified for the promotions in question.

7. Defendant did not discriminatorily fail to promote Plaintiff or otherwise discriminate against Plaintiff in his employment opportunites on the basis of his race.

8. By Order dated September 12, 1975, this action was certified as a class action maintainable by Plaintiff in his own behalf and in behalf of all other black and Mexican-American persons

who have been employed or are employed or may in the future be employed by Defendant.

9. The Court finds that Defendant's policies, practices, customs and usages at its facilities have not discriminated against Plaintiff and the class he represents on the basis of race and/or national origin with regard to hiring, job assignments, promotions, training, seniority, wages, transfers, discharge and other terms and conditions of employment.

10. Plaintiff failed to establish a pattern or practice of Defendant treating Mexican-American employees and/or applicants for employment differently than white employees and/or applicants. Plaintiff's expert witness, Dr. Richard Tapia, testified that Mexican-Americans represented 8.9% of the Houston Standard Metropolitan Statistical Area ("SMSA") labor force. While the Court finds that Mexican-Americans do represent 8.9% of the labor force within the Houston SMSA, based upon the 1970 United States Census, the Court further finds that underemployment of Mexican-Americans within Defendant's labor force was not established.

11. Plaintiff also introduced through Dr. Tapia evidence of differences in upward mobility — wage increases received by Defendant's black and white employees. See Plaintiff's Exhibit No. 8. Such evidence does not, however, when considered in conjunction with countervailing evidence of individual cases offered by Defendant, *establish discriminatory treatment of Defendant's black employees.*

12. During the period from August 8, 1971 through May 10, 1974, limiting the analysis to employees who were employed on both dates, Defendant's black employees received a statistically significant greater wage increase than did Defendant's white employees. See Defendant's Exhibit No. 31. Further, contrary to Table III.3 of Plaintiff's Exhibit No. 8, the Court finds that the percentage increase in black wages exceeded the percentage increase in white wages regardless of whether or not individuals

in job classifications falling within the EEOC category "Officials & Managers" are included. See Defendant's Exhibit No. 31. Utilizing salary level groupings suggested by Plaintiff's Exhibit No. 8, e.g., employees earning less than a given amount, any differences in black-white wage increases during the 1971-74 period were not statistically significant. See Defendant's Exhibit No. 57.

13. The Court finds that any differences in wage increases received by black and white employees, or claimed differences in upward mobility as between black and white employees, were due to specific individual attributes of Defendant's employees. Such differences were not due to the race of the employee concerned. The referenced attributes or upward mobility factors include, for example, limited ability to read, write and make numerical calculations; promotion refusals; demotion requests; non-shift work requests; lack of interest in changing jobs; and performance shortcomings.

14. As of March 31, 1974, the Defendant employed 141 blacks out of a total work force of 394 employees. Considering the job classifications utilized at Defendant's facilities and the necessary requirements for those jobs, and based on the 1970 United States Census availability data, the Court finds the Defendant employed an equitable number of blacks in view of their availability within the Houston SMSA.

15. The large number of black employees employed within Defendant's lower job zones is not the result of racial discrimination.

16. The Court finds, based upon the testimony of Dr. Richard Jeanneret, an expert in the field of industrial psychology and job analysis, that Defendant's requirements for its jobs are valid, job-related and necessary. The Court further finds that certain of Defendant's jobs require knowledge and skills not obtainable through on-the-job or internal Company training or experience.

17. The job classifications/positions within Defendant's Office differ greatly from those within its Plant. They involve and require different skills, knowledge and training.

18. Because of the Office-Plant differences, and because the lines of progression and patterns of promotion respecting wage differentials and time in grade differ significantly, statistical analyses which separate Office and Plant employees are proper and allow meaningful comparisons to be made and conclusions to be drawn. The joinder or lumping together of Office and Plant employees does not provide a meaningful or valid basis for comparing the treatment of black and white employees.

19. In terms of the number of employees promoted, their time in grade prior to promotion and the wage increases received upon being promoted, the Court finds that there has been no statistically significant difference in the treatment of Defendant's black and white employees. See Defendant's Exhibit Nos. 36, 37, 38, 39, 40, 41 and 42 (a-c).

CONCLUSIONS OF LAW

1. Any finding of fact hereinbefore made which constitutes a conclusion of law is hereby adopted as a conclusion of law.

2. The Court finds that Plaintiff Thomas Johnson failed to prove that he was discharged because of his race, or because he filed charges with the EEOC or because he instituted and failed to dismiss these legal proceedings against Defendant, or that his discharge in any manner violated Title VII or § 1981.

3. The Court finds that Defendant Uncle Ben's, Inc. did not unlawfully fail to promote Plaintiff Thomas Johnson or otherwise discriminate against him in his employment opportunities on the basis of his race in violation of either Title VII or § 1981.

4. The Court finds that Defendant Uncle Ben's, Inc.'s employment policies, practices, customs and usages at its various

facilities are non-discriminatory and have not resulted in discrimination against Plaintiff Thomas Johnson and the class he represents on the basis of race and/or national origin with regard to hiring, job assignments, promotions, training, seniority, wages, transfers, discharges and other terms and conditions of employment in violation of either Title VII or § 1981.

5. The Court further finds that all costs of suit should be and hereby are taxed against Plaintiff.

DONE at Houston, Texas, this 11th day of January, 1978.

ROSS N. STERLING
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-1437

THOMAS JOHNSON,

Plaintiff-Appellant,

v.

UNCLE BEN'S INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Appellee's Petition For Rehearing And Suggestion of Rehearing En Banc

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CERTIFICATE REQUIRED BY FIFTH CIRCUIT LOCAL RULE 13 (a):

The undersigned, counsel of record for Uncle Ben's Inc., certifies that the following parties have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal pursuant to Local Rule 13(a).

Uncle Ben's, Inc.
Mars, Inc.
Thomas Johnson
Wald, Harkrader & Ross
Randall L. Speck
Jerry D. Anker
Nelkin & Nelkin
Stuart M. Nelkin
Carol Nelkin
Lawyers Committee for Civil Rights Under Law
Fulbright & Jaworski
Philip J. Pfeiffer
Robert S. Bambace

. . . . . .
PHILIP J. PFEIFFER

Attorney of Record for Defendant-Appellee

D-3

IN THE

United States Court Of Appeals

FOR THE FIFTH CIRCUIT

NO. 78-1437

THOMAS JOHNSON,

Plaintiff-Appellant,

v.

UNCLE BEN'S, INC.,

Defendant-Appellee.

STATEMENT OF COUNSEL OF REASON FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions of this Court:

Adams v. *Reed*, 567 F.2d 1283 (5th Cir. 1978)

Crawford v. *Western Electric*, 614 F.2d 1300 (5th Cir. 1980)

Davis v. *Bd. of School Comrs., Mobile City*, 600 F.2d 470 (5th Cir. 1979)

Furnco Construction Corp. v. *Waters*, 438 U.S. 567 (1978)

Grigsby v. *North Mississippi Medical Center, Inc.*, 586 F.2d 457 (5th Cir. 1978)

Hamilton v. *General Motors Corp.*, 606 F.2d 576 (5th Cir. 1979)

Hazelwood School District v. *United States*, 433 U.S. 299 (1977)

Hester v. *Southern Railway Co.*, 497 F.2d 1374 (5th Cir. 1974)

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977)

Williams v. *DeKalb County*, 582 F.2d 2 (5th Cir. 1978) (on rehearing)

Washington v. *Davis*, 426 U.S. 299 (1976)

PHILIP J. PFEIFFER

Attorney of record for
Defendant–Appellee
Uncle Ben's, Inc.

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42 U.S.C. § 1981 ..... 2, 4

APPELLEE'S PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

STATEMENT OF THE ISSUES

1. Whether the panel improperly concluded that the District Court's prefatory statement to its Findings constituted adoption/application of an erroneous notion of controlling legal principles regarding the role of statistics in an employment discrimination case.

2. Whether the panel's decision conflicts with prior decisions of the United States Supreme Court ("Supreme Court") and this Court by treating under the disparate impact theory plaintiff's allegations that defendant bases promotions on race.

3. Whether the panel's decision conflicts with prior decisions of the Supreme Court and this Court by failing to require a showing of purposeful discrimination under 42 U.S.C. § 1981.

4. Whether the panel erred in concluding that the District Court ignored deciding whether any promotions occurred and, if so, whether Blacks suffered disparate impact or whether there existed legitimate, non-discriminatory reasons for the failure to promote identified black employees.

5. Whether the panel's decision conflicts with prior decisions of the Supreme Court and this Court by holding that statistics comparing an employer's workforce to the external labor market are irrelevant in rebutting or discrediting a *prima facie* showing of discrimination in promotions.

6. Whether the panel's decision conflicts with prior decisions of this Court by ignoring the objective criteria and safeguards present in defendant's promotion process and in condemning it under *Rowe* v. *General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).

STATEMENT OF THE CASE

Course of Proceedings and Disposition

Thomas Johnson ("plaintiff") brought this class action on March 28, 1974, alleging Uncle Ben's, Inc. ("defendant") discriminated against him and similarly situated blacks and Mexican-Americans in violation of 42 U.S.C. § 1981 ("§ 1981") (Record, "R.", 1-5). The complaint was amended September 12, 1975 (R. 135) to add Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Plaintiff's allegations were limited to the period commencing March 28, 1972 (Pretrial Order, p. 4) and charged discrimination "with respect to compensation, hiring, promotion, transfer, seniority and other terms and conditions of employment" (R. 2, 136).

The case was tried October 3-21, 1977, with plaintiff representing a class of blacks and Mexican-Americans (R. 130).

At the end of plaintiff's direct case, defendant's motion for dismissal was granted as to all issues except discrimination in promotion of blacks (Supp. Tr. 26). In rebuttal of plaintiff's *prima facie* case, defendant called its Personnel Manager and three experts and affirmatively established the absence of discrimination.

At the conclusion of plaintiff's direct examination of his expert rebuttal witness, the District Court ruled for the defendant with the following remarks, later incorporated into his detailed Findings entered January 11, 1978 (R. 255-64):

> *First*, on statistic. *If* we accept the plaintiff's side of the case, all that the experts say, the way I see it, is that what has transpired in the real world at Uncle Ben's could not have statistically happened by chance. We are not here to enforce a law which says that things must occur within the limits of mathematical probability. The law says the defendant may not discriminate on the basis of race. The

law does not say that the defendant shall not violate the rules of mathematical probability.

A business such as the defendant's cannot be run successfully by chance. Decisions as to who may best serve in any given job must be made rationally by persons with sufficient knowledge of the individuals and jobs involved to make such decisions.

Second, having had the opportunity both to see and hear all of the witnesses in this case, I have concluded that any discrimination at Uncle Ben's has been color-blind. In this case, it has been between individuals without regards to race or other impermissible criteria. (Tr. 1456-1457; emphasis supplied).

The panel affirmed *per curiam* on April 11, 1980. On April 24, 1980, plaintiff filed a petition for rehearing, contending the panel erred in affirming the District Court's Findings under the clearly erroneous standard. The panel did not request an answer from defendant. On October 17, 1980, the panel granted the petition for rehearing, ruling the District Court adopted/applied an erroneous notion of controlling legal principles on the role of statistics. The panel modified and affirmed in part, reversed in part and remanded.

STATEMENT OF FACTS

Plaintiff's statistical proof in his direct case was limited to testimony by Dr. R. Tapia and Plaintiff's Exhibit 8. Tapia's analysis focused on the existence of disparity with respect to "upward mobility," i.e., monetary advances over time, of black employees (Tr. 637, 658-59, 675, 707, 759, 807). Tapia based his conclusions on Table III, Plaintiff's Exhibit 8 (Tr. 658-59, 680-82, 757, 795, 804-06, 820-21), primarily Table III.3, his only analysis restricted to the relevant time frame.[1] Table III.3

[1] The Pretrial Order stated the issue in terms of determining discrimination from and after March 28, 1972 (Pretrial Order, p.4). This time frame limitation under §1981 is consistent with *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1378 (5th Cir. 1974).

purported to assess the 1971-74 "upward mobility" of blacks and whites *employed both dates* and encompassed only comparisons of *average wage increases*. Tapia relied on Table III.3 to conclude that blacks in lower income groups had not progressed forward as rapidly as whites (Tr. 805-06).

Cross-examination of Tapia and testimony of defendant's expert, Dr. R. Gilbert, disclosed numerous errors in Tapia's analysis at Table III.3 (Tr. 699-701, 727-29, 731, 733, 735, 738-39, 750-51, 755, 765-67, 778-85, 796-98, 805-06, 810-11, 990, 1013-15, 1042-47, 1056-60, D. Ex. 31, 54, 57, 60). When corrected, plaintiff's statistics failed to establish a discriminatory pattern favoring whites (Tr. 1013-18, 1053-60). Rather, the statistics established a pattern of upward mobility which did not favor whites, and, overall, favored blacks with significantly greater wage increases (D. Ex. 31, 57; Findings of Fact 12, R. 260).

Defendant's expert proof was introduced through Dr. R. Jeanneret, Dr. Gilbert and Dr. G. Otto (D. Ex. 52, 53, 56). Jeanneret analyzed defendant's job descriptions in accordance with EEOC and professional guidelines (Tr. 851, 977), and accurately placed Uncle Ben's jobs in 1970 Census occupational categories (Tr. 855-883; D. Ex. 26). He established that a great many jobs require knowledge or skills not obtainable at Uncle Ben's through on-the-job or internal training or experience (Tr. 594, 853, 865, 871-873, 859, 868, 869, 900-02, 905-07, 909-12; Findings of Fact 16, R. 261).

Because many jobs require knowledge or skills not obtainable at Uncle Ben's, Gilbert, using the job to census category correlations (D. Ex. 26) and the 1970 Census (D. Ex. 25), computed

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Under Title VII, a violation could be based only on discriminatory acts occurring within 180 days of the filing of plaintiff's EEOC charge on February 19, 1974, i.e., August 19, 1973. *United Airlines* v. *Evans*, 431 U.S. 553 (1977); *Crawford* v. *Western Electric, Inc.*, 614 F.2d §300 (5th Cir. 1980).

the proportionate availability of whites and blacks for jobs at Uncle Ben's (Tr. 1020-39; D. Ex. 16, 27, 28). He then compared the actual number of employees in Uncle Ben's job zones with this expected number and concluded the employment pattern at Uncle Ben's was consistent with availability (Tr. 1067-71, 1155-56; Findings of Fact 14, R. 261).

Otto examined all promotions during 1970-74 (D. Ex. 36-41, 42(A)(C)), and concluded that no statistically significant differences existed in the advancement of blacks and whites (a) in the number of promotions, (b) time in grade prior to promotion and (c) wage increases received upon promotion. (Tr. 917, 1174, 1183-1188, 1191-1202, 1208-20, 1233-34; Findings of Fact 19, R. 262).

Defendant's Personnel Director presented evidence of the upward mobility of blacks allegedly relegated to lower jobs (P. Ex. 8; D. Ex. 58, 59a). He testified that differences in black-white upward mobility were due not to race, but to specified individual attributes of the employees in question, e.g., lack of interest in changing jobs; failure to obtain outside training in requisite skills; limited ability to read, write, and make numerical calculations; promotion refusals; demotion requests; non-shift work requests; and performance shortcomings (Tr. 1297-1308, 1315-1318, 1337-41; Findings of Fact 11, 13, R. 259-60).

ARGUMENT
ISSUE 1

The District Court's prefatory statement to its Findings is correct — "The law does not say that the defendant shall not violate the rules of mathematical probability." With the numerous Findings regarding statistical analyses (Findings of Fact 10-14, 19, R. 259-62), and the conclusion that plaintiff's statistics made a *prima facie* case on upward mobility/promotions, (Supp. Tr.

26-27), it cannot be said the District Court ignored or considered irrelevant statistical evidence. Thus, the panel's conclusion that such statement constitutes an erroneous view of controlling legal principles apparently is based on the perception that the District Court believed intent to be an element in a disparate impact case. This perception is erroneous.

The District Court stated that even *if* plaintiff's statistical analysis were credited,[2] all it showed was that what transpired at Uncle Ben's could not have statistically happened by chance. Significantly, noting that the law does not say defendant shall not violate the rules of mathematical probability, the District Court added that having seen and heard all of the witnesses, in the Court's judgment, any discrimination — any violation of the rules of mathematical probablity — "has been colorblind . . . between individuals without reference to race" (R. 256).

When read in context, it is clear that all the District Court said was that evidence of statistical disparities does not *prove* discrimination. While statistical disparities may establish a *prima facie* case, the inquiry is not ended. The burden merely shifts and the defendant is given an opportunity to rebut plaintiff's statistics or justify and disparities by showing legitimate, non-discriminatory reasons for its actions. Where such reasons exist, statistical imbalances, even if present, mean nothing.

The District Court's statement is entirely consistent with *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), and *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), wherein it was recognized that while "gross statistical disparities . . . alone may in a proper case constitute *prima facie* proof . . . of discrimination," *Hazelwood*,

[2] Significantly, Finding of Fact 12 (R. 260) makes clear that the court *did not* credit plaintiff's statistical analysis, finding inaccurate plaintiff's conclusions based on Table III.3. Notably, Table III.3 provided the sole basis for Tapia's conclusion that during the relevant time frame, blacks suffered limited upward mobility.

supra at 307-08, quoting *Teamsters, supra* at 339, they "are not irrefutable" and "[t]heir usefulness depends on all of the surrounding facts and circumstances." *Teamsters, supra* at 340; *see also Hazelwood, supra* at 312-13. While statistics may be "helpful" in proving discrimination, they are not controlling as to individualized employment decisions. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 805 n.19 (1973).

United States v. *Hayes International Corp.,* 456 F.2d 112, 120 (5th Cir. 1972), recognized that even "lopsided ratios are not conclusive proof of . . . discriminatory hiring practices . . .," but merely establish a *prima facie* case, shifting the burden to defendant. *Hereford* v. *Huntsville Board of Education,* 574 F.2d 268, 273 (5th Cir. 1978), although noting that "at first blush" the statistics might support the inference that plaintiffs were denied promotions on account of their race, concluded that

> [d]iscrimination in promotions is not proved merely by the absence of blacks in particular positions in particular schools. For a cause of action to exist, the defendants actually must have discriminated on the basis of race.

It is clear the District Court's Findings of Fact should have been judged under the clearly erroneous standard.

ISSUE 2

If the District Court's prefatory statement could be interpreted as requiring plaintiff to prove discriminatory intent, the statement is nevertheless absolutely correct. Although the panel treated this case as one of *disparate impact,* the case appropriately must be judged under the *disparate treatment theory.*

Although plaintiff generally claimed that blacks suffered limited upward mobility, such limitations were not ascribed to any particular employment practice of defendant, much less to any

objective or facially neutral practices.[3] Plaintiff simply contended that blacks suffered limited upward mobility because of their race.

Davis v. *Board of School Commissioners*, 600 F.2d 470 (5th Cir. 1979), recognized that "such alleged discrimination is, by definition, the result of overt consideration of race," and is properly categorized as a *disparate treatment* case, requiring proof of discriminatory animus. The Court expressly recognized that the disparate impact theory is limited to facially neutral employment practices, such as tests, and not to allegations that "defendant based . . . promotions on race." *Id.* at 473.

This limitation on the disparate impact theory was emphasized by the Supreme Court in *Furno Construction Corp.* v. *Waters*, 438 U.S. 567 (1978), involving allegedly discriminatory hiring based upon subjective management decisions. *Furnco* held that plaintiff's claim must be analyzed under the disparate treatment rationale of *McDonnell Douglas, supra*, reasoning:

> This case does not involve employment tests, which we dealt with in *Griggs* v. *Duke Power Company, supra*, and in *Albermarle Paper Company* v. *Moody*, . . . nor particularized requirements such as the height and weight specifications considered in *Dothard* v. *Rawlinson*, . . . and it was not a "pattern or practice" case like *International Brotherhood of Teamsters* . . . .

---

[3] It is true that on appeal, Plaintiff *for the first time* argued that Defendant has as an employment criteria "educational requirements," namely "specific degrees or formal courses of study" that operated to exclude minorities, citing the testimony of Defendant's expert, Dr. Jeanneret. (Tr. 837, 951-52, 973). This argument and the panel's statements regarding this matter are totally inaccurate. Dr. Jeanneret explicitly testified that Uncle Ben's does not require specific degrees or educational levels (Tr. 951) and his testimony cited by plaintiff merely reveals some specific types of knowledge or skills typically, but not necessarily, obtained in an educational environment which, *in Dr. Jeanneret's opinion*, would be appropriate for various jobs at Uncle Ben's, (Tr. 837, 951-973).

Furnco, supra at n.7. *Accord, Teamsters, supra* at 335, quoting *McDonnell Douglas, supra* at 805 n.18.

Plaintiff's claim of racial discrimination alleges overt consideration of race and must be judged under the disparate treatment theory, which requires proof of racial motivation. *Teamsters, supra* at 335 n.15, *Crawford* v. *Western Electric Co., supra* at 1309.

ISSUE 3

The panel's decision draws no distinction between claims under Title VII and under § 1981. This failing permits plaintiff to prevail on the § 1981 claim without proving purposeful discrimination, with the panel stating "the class plaintiffs do not need to prove knowing and intentional discrimination . . . ." *Johnson* at 422. This result is inconsistent with decisions of this Court and the Supreme Court. This Circuit has repeatedly held that "we require a showing of purposeful discrimination in cases brought under 42 U.S.C. § 1981." *Crawford* v. *Western Electric, supra* at 1308-09. *See also Grisby* v. *North Mississippi Medical Center, Inc.*, 586 F.2d 457 (5th Cir. 1978); *Williams* v. *DeKalb County*, 582 F.2d 2 (5th Cir. 1978) (on rehearing); cf. *Washington* v. *Davis*, 426 U.S. 229 (1976).

This issue is of paramount importance because this is primarily a § 1981 action, not a Title VII action. Suit was initially filed under § 1981 on March 28, 1974, with the relevant time frame commencing March 28, 1972. *Johnson* v. *Goodyear Tire & Rubber Co., supra.* The Title VII allegations were not added until September 12, 1975, with the relevant time frame commencing August 19, 1973, i.e., 180 days prior to the filing of the underlying EEOC charge. *United Airlines* v. *Evans, supra.* Plaintiff's evidence did not extend beyond May, 1974 (P. Ex. 8); Thus, purposeful discrimination must be shown for that part of the relevant time frame covered only by § 1981, March 28, 1972

to August 19, 1973; and, as noted, since this is properly a disparate treatment case, purposeful discrimination must also be shown under Title VII. *Crawford* v. *Western Electric Co., supra.*

ISSUE 4

The panel's conclusion that the District Court ignored deciding the question whether any promotions occurred at Uncle Ben's, and if so, whether blacks suffered disparate impact in promotions is inaccurate. This conclusion ignores Finding 19, which credits Dr. Otto's testimony that no statistically significant differences exist in the advancement of Defendant's black and white employees (a) in terms of the numbers of promotions (b) time in grade prior to promotion, and (c) wages increases received upon promotion. This conclusion was based upon defendant's Exhibits 36-41, 42(A-C), wherein all promotions from 1970 to 1974 were analyzed in terms of factors (a), (b) and (c) above, *with the proportionality of promotions compared against the internal workforce* (Tr. 118, 1174-1220; Findings of Fact 19, R. 262).

Further, contrary to the panel's conclusion, *Johnson* at 427, Finding 12 does not "incorporate or commingle facts about lateral hiring." Finding 12 addresses black-white wage increases and is *limited to employees employed throughout the relevant time frame.* It addresses "upward mobility" as a function of wage increases and has nothing to do with hiring, and finds *"Defendant's black employees received a statistically significant greater wage increase than did Defendant's white employees"* (Findings of Fact 12, R. 260; emphasis added).

The District Court, in addition, and contrary to the panel's conclusion, did decide whether there existed legitimate, non-discriminatory reasons for the failure to promote blacks whom plaintiff alleged were not promoted or were promoted at a lower

rate than whites. Findings 11 and 13 credit Defendant's testimony that any differences in upward mobility of blacks identified by plaintiff were not due to race, but to individual attributes of the employees in question. Such testimony rebutted plaintiff's statistics on upward mobility differentials (Findings of Fact 11, R. 259-60).

ISSUE 5

The panel's holding that statistics comparing defendant's workforce to the external labor market would be irrelevant in rebutting or discrediting a *prima facie* showing of discrimination in promotions is contrary to the teaching of the Supreme Court in *Hazelwood School District, supra. Hazelwood* recognized that when positions require special qualifications not presumptively possessed, comparative statistics must be limited to members of the protected group who possess such requisite skills and qualifications. *Hazelwood, supra* at 308 n.13; *see also Mayor of Philadelphia* v. *Educational Equality League,* 415 U.S. 605, 620 (1974). This requirement was also recognized in *Hester* v. *Southern Railway Co.,* 497 F.2d 1374 (5th Cir. 1974), cited with approval in *Teamsters supra* at 340.

Decisions emphasizing promotion analysis comparisons against internal workforce makeup, e.g., *James* v. *Stockham Valves & Fittings Co.,* 559 F.2d 310, 331, 341 (5th Cir. 1977), *Fisher* v. *Proctor & Gamble,* 613 F.2d 527, 543-44 (5th Cir. 1980), are not controlling since unlike a great many of the challenged positions at Uncle Ben's, the qualifications for the positions in question in *Stockham Valves* and *Proctor & Gamble* were obtained through on-the-job training at those companies. At Uncle Ben's many jobs require qualifications not obtainable through internal training or experience (Tr. 853, 865, 868-73, 900-02, 905-07, 909-12; Findings of Fact 16, R. 261). Employees promoted to such positions obtain the requisite qualifications externally, and there is no reason to suspect

internal availability for such positions differs from external availability. Thus, comparisons to external availability are relevant.[4]

ISSUE 6

Ignoring the objective criteria and safeguards present in defendant's promotion procedure, the panel erroneously concluded that Uncle Ben's had a "subjective selection [process] involving white supervisors [which] provide[s] a ready mechanism for racial discrimination." *Johnson* at 428. Such criteria and safeguards include:

> (1) Written job descriptions provide the basis for assessing qualifications (Tr. 161-62, 191, 436-37, 459, 862, 974-75), are not vague or subjective and are "valid, job related and necessary" (Tr. 862, 974-75; Findings of Fact 16, R. 261).
>
> (2) The supervisor's recommendation is not "the indispensable single most important factor in the promotion process" (Tr. 160-62, 180-81, 384, 402, 459). As the named plaintiff (a black supervisor) made clear, an individual supervisor, or any one supervisor cannot thwart an employee's promotional opportunities (Tr. 64-65).
>
> (3) The list of potential promotion candidates emanated from the Personnel Department, not the immediate supervisors (Tr. 180-81, 410-11).
>
> (4) The Personnel Department is involved in all promotion decisions to insure (a) equality and fairness and (b)

[4] In any event, as found at Finding 19 and discussed under Issue 4 herein, the comparison of promotions against the internal workforce discloses the absence of disparity in (a) the number of blacks promoted, (b) their time in grade prior to promotion and (c) wage increases received upon being promoted.

consistency with Uncle Ben's equal employment opportunity goals and obligations (Tr. 155, 161, 402-03). Personnel representatives receive extensive training in this area (Tr. 152-53, 187, 393, 556), and the instruction process is purposefully extended to supervisors (Tr. 281-85, 417-18, 492-93, 494-95, 555-56, 588). Employees have a meaningful opportunity for appeal and review of employment decisions (Tr. 65, 67, 95-96, 198-99, 231-34, 270, 271, 402).

Criteria such as defendant's job descriptions, which clearly relate to the skills demanded by the various jobs, are sufficiently capable of objective determination to prevent the occurrence of prejudice in the promotion process. *See, e.g., Ramirez* v. *Hofheinz,* 619 F.2d 442 (5th Cir. 1980); *Hamilton* v. *General Motors Corp.,* 606 F.2d 576 (5th Cir. 1979); *Adams* v. *Reed,* 567 F.2d 1283 (5th Cir. 1978). Unless promotion decisions involving judgments are *per se* illegal, the standards/safeguards adopted by Uncle Ben's are virtually all an employer can do and they render *Rowe* inapposite.

CONCLUSION

For the reasons stated, the Court should grant rehearing or alternatively, rehearing en banc. Upon rehearing, the Court should vacate its judgment and enter judgment affirming the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Philip J. Pfeiffer, Attorney for Uncle Ben's, Inc., do hereby certify that on this 10th day of November, 1980, copies of the foregoing Petition for Rehearing and Suggestion of Rehearing En Banc were mailed to Plaintiff's counsel as follows:

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PHILIP J. PFEIFFER

APPENDIX E

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

NOVEMBER 24, 1980

TO ALL PARTIES LISTED BELOW:

No. 78-1437

THOMAS JOHNSON, ETC. v. UNCLE BEN'S INC.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By SALLY HAYWARD
Deputy Clerk

cc: MS. CAROL NELKIN
MR. RANDALL L. SPECK
MR. PHILIP J. PFEIFFER

APPENDIX F

42 U.S.C. § 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 2000e-2 provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin

employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

No. 80-1420

MAR 25 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNCLE BEN'S, INC.

Petitioner,

v.

THOMAS JOHNSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court below correctly applied the disparate impact theory to an employment promotion system in which subjective evaluations were coupled with promotion criteria that were facially neutral but racially discriminatory in effect?
2. Whether the Court below correctly identified the district court's errors in applying controlling legal principles regarding the role of statistics in an employment discrimination case?
3. Whether the Court below correctly remanded judgment to the district court with instructions to consider additional evidence in order to determine whether internal workforce data or external labor market data accurately defines the relevant labor pool?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1420

UNCLE BEN'S, INC.

Petitioner,

v.

THOMAS JOHNSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Thomas Johnson, plaintiff-respondent (hereinafter "plaintiff"), brought this class action on March 28, 1974, alleging that Uncle Ben's, Inc. (hereinafter "Uncle Ben's" or "defendant") had discriminated against him and all similarly situated blacks and Mexican-Americans in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* He sought injunctive, declaratory, and compensatory relief to redress Uncle Ben's discriminatory practices with respect to compensation, hiring, promotion, transfer, seniority, and other terms and conditions of employment.

On September 12, 1975, the district court determined that plaintiff could represent a class of all "black and Mexican-American persons who have been employed or are employed or may in the future be employed by Defendant Uncle Ben's, Inc." At the trial in October 1977, plaintiff and other Uncle Ben's employees described the working conditions and opportunities for minorities at Uncle Ben's. Plaintiff also presented expert statistical testimony by Dr. Richard Tapia that black employees received significantly fewer promotions than comparable white employees and that Mexican-Americans were significantly under-represented in defendant's work force when compared with their representation in the Houston area's labor force.

At the conclusion of plaintiff's direct case, defendant moved for dismissal of all allegations. The motion was granted as to all issues of Mexican-American employment and as to the compensation, hiring, transfer, seniority, and other employment terms and conditions of blacks. The court did find, however, that plaintiff had established a *prima facie* case of discrimination in the promotion of blacks.

Defendant called its personnel manager and three experts in an effort to rebut plaintiff's *prima facie* showing. These experts compared Uncle Ben's employment of blacks with the utilization of blacks in allegedly comparable Bureau of the Census job classifications within the Houston Standard Metropolitan Statistical Area (SMSA). One expert also analyzed promotion data for whites and blacks using very small job categories for his comparison. Defendant's expert also criticized Dr. Tapia for certain minor statistical errors. In rebuttal, plaintiff's statistician, Dr. Robert Thrall, testified that the small statistical sample used by defendant's experts was unreliable and that there were significant differences in promotion rates between whites and blacks when adequate samples were used.

At the conclusion of plaintiff's direct examination of his expert rebuttal witness but before defendant had been allowed to cross-examine, the district court ruled for the defendant from the bench. In a prepared oral statement, the court rejected all statistical analyses as irrelevant. It concluded that "any discrimination at Uncle Ben's has been color blind" and "without reference to race or other impermissible criterion." *See* Pet. App. C-2. Judge Sterling subsequently entered written findings of fact and conclusions, prefacing them with a reiteration of his oral denunciation of the use of statistics in an employment discrimination case. Final judgment was entered for the defendant on January 13, 1978.

The Fifth Circuit initially affirmed the district court's opinion *per curiam* on April 11, 1980. On rehearing, however, it modified and affirmed the district court's opinion in part and reversed in part and remanded. The Court affirmed the district court's dismissal of plaintiff's allegations of discrimination against Mexican-Americans but modified the court's judgment to find that dismissal to be without prejudice (Pet. App. A-8-9). The Court then held that the district court's "erroneous notion of the controlling legal principles regarding the use and role of statistics in an employment discrimination case" (Pet. App. A-5) compelled the appellate court's independent analysis of the record (Pet. App. A-7). The Fifth Circuit analyzed the district court's findings of fact within the context of the discriminatory impact theory of employment discrimination (Pet. App. A-11-14). It then found those findings inadequate because they failed to identify the relevant labor pool for promotions at Uncle Ben's and precluded the court from evaluating the discriminatory impact of the defendant's promotion practices (Pet. App. A-14). The Court therefore remanded the case for an assessment of the discriminatory impact based upon employment statistics that distinguished internal promotion from lateral hiring (Pet. App. A-15).

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT CORRECTLY APPLIED THE DISPARATE IMPACT THEORY TO AN EMPLOYMENT PROMOTION SYSTEM IN WHICH SUBJECTIVE EVALUATIONS WERE COUPLED WITH PROMOTION CRITERIA THAT WERE FACIALLY NEUTRAL BUT RACIALLY DISCRIMINATORY IN EFFECT.

The Fifth Circuit's opinion follows long-established Supreme Court and Circuit Court precedent defining the elements required to prove a case of disparate racial impact in employment hiring and promotion. Knowing or intentional discrimination need not be shown in a disparate impact case (Pet. App. A-6). In order to establish a *prima facie* case, a plaintiff must demonstrate only that a facially-neutral employment qualification has a racially-discriminatory impact. The burden of proof then shifts to the defendant to demonstrate that the discriminatory procedure is required by business necessity or that there is a manifest relationship between the qualification and employment responsibilities. *See, e.g., Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 336 n.15 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

The promotion procedure at Uncle Ben's is a classic example of a system that is racially neutral in outline but significantly discriminatory in impact. Prior to May 1974 when this suit was filed (Pet. App. A-16-17), Uncle Ben's employees were passive members of a system by which personnel officers contacted employees that they considered potential applicants for promotion, and these applicants' qualifications were then evaluated by the candidate's present and prospective supervisors (almost all of whom were white) in conjunction with the personnel office. There were no specific guidelines to aid supervisors

in avoiding discriminatory decisions. Although Uncle Ben's began to post job vacancy notices for hourly jobs in 1974, about the time these proceedings began, the procedure of subjective supervisory evaluation continues unabated.

The Fifth Circuit noted that Uncle Ben's promotion system substantially embodied the mechanisms the Court had invalidated in *Rowe* v. *General Motors Corp.*, 457 F. 2d 348 (5th Cir. 1972) (Pet. App. A-16). Although the foreman's recommendation is the "indispensible single most important factor in the promotion process," he is given no written instructions on proper evaluation of qualifications, and the standards articulated for judgment are vague and subjective. Hourly employees are not notified of promotion opportunities and qualifications, and there are no safeguards evident to prevent discrimination. *Id.* at 358-59. *See also Wade* v. *Mississippi Cooperative Extension Service*, 528 F.2d 508, 518 (5th Cir. 1976) (§ 1981 standard). Quite similar promotion systems were condemned as having discriminatory impact in *Swint* v. *Pullman-Standard*, 624 F.2d 525 (5th Cir. 1980); *Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *EEOC* v. *Radiator Specialty Co.*, 610 F.2d 178 (4th Cir. 1979); *Robinson* v. *Union Carbide Corp.*, 538 F.2d 652 (5th Cir. 1976), *modified*, 544 F.2d 1258, *cert. denied*, 434 U.S. 822 (1977).

The Fifth Circuit found that the central elements of a disparate impact in promotions case had been established but that additional evaluation of the evidence would be required for a proper assessment of the discriminatory effect. The Fifth Circuit did not merely assume that classwide claims automatically raise disparate impact issues, as Petitioner claims (Pet. 28-29). Rather, the Court of Appeals clearly articulated the similarity of

Uncle Ben's promotion system to the *Rowe* v. *General Motors Corp.* facially neutral but effectively discriminatory promotion system (Pet. App. A-16-17).[1] The Court noted that a promotion system based upon the use of unguided, subjective supervisory evaluations is a "ready mechanism for racial discrimination" despite the facial neutrality of the system (Pet. App. A-16, *citing Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1383 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979); *James* v. *Stockham Valves & Fittings Co.*, *supra*, 559 F. 2d at 345; *Rowe* v. *General Motors Corp.*, *supra*, 457 F.

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[1] Petitioner's reference to the standards controlling disparate treatment cases is irrelevant (Pet. 23-29). It is true that some of the Fifth Circuit's language and citation in describing the use of statistics in establishing the fact of promotion discrimination might be used more appropriately in a case of disaparate treatment than in the instant disparate impact case. The opinion could be phrased more accurately in terms of the defendant's need to prove "business necessity" and a "manifest relationship" between promotion qualification and successful job performance than in terms of articulating "legitimate, nondiscriminatory reasons" for action (Pet. App. A-10-11). This brief instance of inexact dictum does not negate the opinion's clear holding, however, that Uncle Ben's employment practices must be evaluated under a disparate impact theory (Pet. App. A-13-14, 16-18).

The Supreme Court's recent reversal of a Fifth Circuit disparate treatment case in *Texas Department of Community Affairs* v. *Burdine*, 49 U.S.L.W. 4214, 4215 n.5 (March 4, 1981), reiterated the different factual issues and evidentiary character in disparate impact cases. Any remand of the instant disparate impact case for reconsideration in light of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *Burdine*, both disparate treatment cases, would needlessly confuse the courts that have thus far distinguished the substance and procedure of disparate treatment and impact litigation. *See McDonnell Douglas*, *supra*, 411 U.S. at 802 n.14; *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 336. The reversal of the *Burdine* case and its reference to the distinction between disparate impact and treatment theories have put the Fifth Circuit on notice of the need for clarity in defining the nature and procedures for the two distinct types of cases.

2d at 359). *See also Robinson* v. *Union Carbide Corp., supra,* 538 F.2d at 662; *Watkins* v. *Scott Paper Co.,* 530 F.2d 1159, 1189 and 1193 (5th Cir.), *cert. denied,* 429 U.S. 861 (1976); *Barnett* v. *W.T. Grant Co.,* 518 F.2d 543, 550 (4th Cir. 1975); *Nath* v. *General Electric Co.,* 438 F. Supp. 213, 220 (E.D. Pa. 1977), *aff'd,* 594 F.2d 855 (3d Cir. 1979). Such a selection procedure, although informal, casual, and unstructured, must satisfy the business necessity test if it creates a disparate impact. *See* the Equal Employment Opportunities Commission's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.16(Q) (1978). Furthermore, the Court noted that Uncle Ben's educational requirements could cause a disparate impact on blacks and would be lawful only if required by "business necessity" and validated under the Equal Employment Opportunities Commission's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1978).[2] The Court found that such requirements are not a "measure of probable performance for many jobs at Uncle Ben's" (Pet. App. A-17-18, *citing Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975); *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431; *Payne* v. *Travenol Laboratories, Inc.,* 565 F.2d 895, 899-900 (5th Cir.), *cert. denied,* 439 U.S. 835 (1978)).

The Fifth Circuit correctly held that discriminatory subjective evaluations and unvalidated selection procedures are unlawful if they are part of a promotion system that has disparate racial impact. *See* Pet. App. A-16-

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[2] Many courts have observed that the EEOC guidelines are entitled to "great deference" when identifying the validation techniques sufficient to prove that an educational requirement is a business necessity. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 431 (1975); *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 434; *Guardians Ass'n. of New York City* v. *Civil Serv.,* 630 F.2d 79, 91 (2d Cir. 1980); *James* v. *Stockham Valves & Fittings Co., supra,* 559 F.2d at 337.

17. It is the definition of the disparate impact itself that led the Fifth Circuit to remand the instant case to the district court for additional evidence (Pet. App. A-15). The district court did not evaluate the proportion of black applicants denied promotions, and the Court of Appeals could not do so because the relevant labor pool was insufficiently identified (Pet. App. A-13-16). The Fifth Circuit's direction to the district court to assess disparate impact using the proper standard and then to judge the procedures that create the disparity comports with the settled legal standards for a disparate impact Title VII case. The issues the district court has been asked to resolve are purely factual matters and are inappropriate for resolution by an appellate court.

II. THE FIFTH CIRCUIT CORRECTLY IDENTIFIED THE DISTRICT COURT'S ERRORS IN APPLYING CONTROLLING LEGAL PRINCIPLES REGARDING THE ROLE OF STATISTICS IN AN EMPLOYMENT DISCRIMINATION CASE.

The Fifth Circuit correctly held that statistics on a defendant's work force serve an important role in judging employment discrimination cases and that gross statistical disparities may alone constitute *prima facie* proof in such cases (Pet. App. A-6, *citing International Brotherhood of Teamsters v. United States, supra,* 431 U.S. at 339; *Hazelwood School District* v. *United States,* 433 U.S. 299, 307-08 (1977); *Fisher* v. *Procter & Gamble Manufacturing Co.,* 613 F.2d 527, 543-44 (5th Cir. 1980) (U.S. appeal pending)). *See also Swint* v. *Pullman-Standard, supra,* 624 F.2d at 529; *Rowe* v. *General Motors Corp., supra,* 457 F.2d at 357-58. The Court also correctly held that the district court in the instant case applied an erroneous notion of the controlling law on the use of statistics (Pet. App. A-5).

At the conclusion of plaintiff's direct examination of his expert rebuttal witness, District Judge Sterling ruled for the defendant from the bench. His statement rejected all statistical evidence as irrelevant:

> If we accept the plaintiff's side of the case, all that the experts say, the way I see it, is that what has transpired in the real world at Uncle Ben's could not have statistically happened by chance. We are not here to enforce a law which says that things must occur within the limits of a mathematical probability. The law says the defendant may not discriminate on the basis of race. The law does not say that the defendant shall not violate the rules of mathematical probability.

(Pet. App. C-2). He concluded that "any discrimination at Uncle Ben's has been color blind" and "without reference to race or other impermissible criterion" (Pet. App. C-2).

Although Judge Sterling subsequently filed highly conclusory findings of fact and law that alluded to the statistical evidence, these findings were prefaced with the admonition that "reference in these findings of fact concerning statistical significance should not be taken as a dilution of what was announced from the bench as the basis for decision at the end of the evidence" (Pet. App. C-1). The court's clear assumption that plaintiff must prove knowing, intentional discrimination to prevail and that a "color blind" policy cannot violate Title VII regardless of its impact contravenes the established principles of the disparate impact Title VII case. This incorrect premise tainted all of the district court's findings and required the Fifth Circuit's reversal.

The district court's findings were, in fact, little more than judicial repetition of the defendant's proposed findings. Of nineteen findings made by the district court, seventeen were taken verbatim from the defendant's proposals and the remaining two reflected only minor modi-

fications. Where a court makes "no analysis of the statistical information or the weight to be accorded it . . . [and] there is, as here, an absence of a critical review of the relevant facts culminating in a coherent body of factual findings which is particularly called for in a discrimination case," the appellate court must make an independent review of the facts free of the "clearly erroneous" rule. *Lewis* v. *Tobacco Workers' International Union*, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979); *EEOC* v. *United Virginia Bank/Seaboard National*, 555 F.2d 403 (4th Cir. 1977). This independent review of the facts is particularly warranted where the district court's findings were stated in terms of ultimate facts such that the appellate court would be compelled to make its own findings of subsidiary facts. *Parson* v. *Kaiser Aluminum & Chemical Corp.*, *supra*, 575 F.2d at 1383. *Accord*, *James* v. *Stockham Valves & Fittings Co.*, *supra*, 559 F.2d at 314.

Much of petitioner's argument to support the issuance of a writ of certiorari debates the specificity and adequacy of the district court's evaluation of the plaintiff's statistics (Pet. 15-18), yet the factual adequacy of the case is precisely the issue remanded for decision by the Fifth Circuit (Pet. App. A-14-15). The Court of Appeals has not rendered an independent judgment of the plaintiff's allegation of disparate impact; rather, it has instructed the lower court to categorize the statistics that are relevant under controlling legal principles in order to determine whether disparate impact has been established. It is precisely this sort of evidentiary issue that is appropriate for a trial court, and not for the nation's highest appellate court.[3]

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[3] *See, e.g., United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"); *United States* v. *County of Fairfax, Va.*, 629 F.2d 932, 943 (4th Cir. 1980) (remand, because "with these legal cri-

III. THE FIFTH CIRCUIT CORRECTLY REMANDED JUDGMENT TO THE DISTRICT COURT WITH INSTRUCTIONS TO CONSIDER ADDITIONAL EVIDENCE IN ORDER TO DETERMINE WHETHER INTERNAL WORKFORCE DATA OR EXTERNAL LABOR MARKET DATA ACCURATELY DEFINES THE RELEVANT LABOR POOL.

Far from embracing the theory that "a *prima facie* case of promotion discrimination can be established through static workforce data showing that as of a particular date the percentage representation of a protected class in upper level positions differs from that group's percentage representation in lower level positions" (Pet. 18), the Fifth Circuit actually held that evaluation of the plaintiff's case was impossible until the district court determined "whether any promotion or upward mobility occurs at Uncle Ben's, and, if so, whether blacks suffer a disparate impact in seeking promotions" (Pet. App. A-14). The Court of Appeals did indeed assert that internal workforce statistics would be controlling for evaluation of any disparate impact for jobs filled by promotion from within (Pet. App. A-14). The Court also asserted that static workforce figures would be "inapplicable" if "vacant positions ordinarily are filled by lateral hires or hiring from among graduates or relevant educational programs" (Pet. App. A-14). The district court's findings were "useless," not because they relied upon external labor market figures but because they "commingle[d] facts about lateral hiring" with facts about promotion from within (Pet. App. A-14). Again, the resolution of this factual confusion is a matter to be decided on remand by the district court, the proper forum for this kind of evidentiary review.

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teria as a guide, we think that the initial exploration of the factual mazes of the disparate impact case should be undertaken by the district court and not by us").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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